

7-22-2010

Pioneer Irrigation District v. City of Caldwell Clerk's Record v. 9 Dckt. 37242

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Vol 9 of 25

(VOLUME 9)

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

PIONEER IRRIGATION DISTRICT,

**Plaintiff-Counterdefendant-
Respondent,**

-vs-

CITY OF CALDWELL,

**Defendant-Counterclaimant-
Appellant.**

Appealed from the District of the Third Judicial District
for the State of Idaho, in and for Canyon County

Honorable GREGORY M. CULET, District Judge

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
Erik F Stidham
HOLLAND & HART LLP

Attorneys for Appellant

Scott L Campbell
MOFFATT THOMAS BARRETT
ROCK & FIELDS CHTD

Attorney for Respondent



37242

IN THE SUPREME COURT OF THE
STATE OF IDAHO

PIONEER IRRIGATION DISTRICT,
Plaintiff-Counterdefendant-Respondent,
-vs-
CITY OF CALDWELL,
Defendant-Counterclaimant-Appellant.

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Supreme Court No. 37242

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE GREGORY M. CULET, Presiding

Mark Hilty, HAMILTON MICHAELSON & HILTY, LLP.,
P. O. Box 65, Nampa, Idaho 83653-0065

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Attorney for Respondent

TABLE OF CONTENTS

	Page No.	Vol. No.
Register of Actions	1 – 28	1
Complaint for Declaratory and Injunctive Relief, filed 1-16-08	29 – 41	1
Answer Counterclaim and Demand for Jury Trial, filed 2-15-08	42 – 96	1
Reply to City of Caldwell's Counterclaim, etc., filed 3-18-08	97 – 104	1
Amended Complaint for Declaratory and Injunctive Relief, filed 6-20-08	105 – 118	1
Answer to Amended Complaint Counterclaim and Demand for Jury Trial, filed 7-9-08	119 – 174	1
Reply to City of Caldwell's Amended Counterclaim and Demand for Jury Trial, filed 7-28-08	175 – 183	1
City of Caldwell's Motion for Partial Summary Judgment, filed 12-23-08	184 – 186	1
City of Caldwell's Brief in Support of Motion for Partial Summary Judgment, filed 12-23-08	187 – 195	1
Response Brief in Opposition to City of Caldwell's Motion For Partial Summary Judgment, filed 1-7-09	196 – 214	2
Affidavit of Andrew J. Waldera, filed 1-7-09	215 – 224	2
Affidavit of Matthew J. McGee, filed 1-7-09	225 – 235	2
Affidavit of Counsel in Support of Reply to Response to Motion for Partial Summary Judgment, filed 1-20-09	236 – 242	2
City of Caldwell's Reply Brief in Support of Motion for Partial Summary Judgment, filed 1-20-09	243 – 257	2
Second Affidavit of Dylan B Lawrence, filed 1-28-09	258 – 270	2

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
City of Caldwell's Reply to Second Affidavit of Dylan Lawrence, filed 1-30-09	271 – 274	2
Sur-Reply to City of Caldwell's Reply to Second Affidavit of Dylan B Lawrence, filed 2-4-09	275 – 278	2
Proposed Order Regarding City of Caldwell's Motion to Dismiss for Failure to Join, filed 3-4-09	279 – 281	2
Order Regarding City of Caldwell's Motion to Partial Summary Judgment, filed 3-4-09	282 – 285	2
Written Statement Regarding Urban Storm Water Outfall Identification, filed 3-12-09	286 – 288	2
Affidavit of Mark Zirschky, filed 3-12-09	289 – 308	2
Affidavit of Steven R. Hannula, filed 3-12-09	309 – 325	2
Second Amended Complaint for Declaratory and Injunctive Relief, filed 5-11-09	326 – 339	2
City of Caldwell's Answer to Second Amended Complaint; Second Amended Counterclaim, etc., filed 5-28-09	340 – 393	2
Reply to City of Caldwell's Second Amended Counterclaim and Demand for Jury Trial, filed 6-17-09	394 – 402	3
Motion for Partial Summary Judgment, filed 7-10-09	403 – 407	3
Memorandum in Support of Motion for Partial Summary Judgment, filed 7-10-09	408 – 455	3
Affidavit of Dylan B Lawrence in Support of Motion for Partial Summary Judgment, filed 7-10-09	456 – 527	3
Plaintiff Pioneer Irrigation Districts Expert Witness Disclosure, filed 7-10-09	528 – 711	4
Plaintiff Pioneer Irrigation Districts Expert Witness Disclosure,(Continued), filed 7-10-09	712 – 744	5

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Affidavit of Alan Newbill, filed 7-10-09	745 – 765	5
Affidavit of Jennifer Stevens Ph D, filed 7-10-09	766 – 839	5
Plaintiff Pioneer Irrigation Districts First Supplemental Expert Witness Disclosure, filed 7-28-09	840 – 853	5
City of Caldwell's Second Motion for Summary Judgment, filed 7-28-09	854 – 856	5
Memorandum in Support of City of Caldwell's Second Motion for Summary Judgment, filed 7-28-09	857 – 907	5
Affidavit of Scott E Randolph in Support of City of Caldwell's Second Motion for Summary Judgment, filed 7-28-09	908 – 1092	6
Affidavit of Scott E. Randolph (Continued), filed 7-28-09	1093 – 1157	7
Affidavit of Debbie Geyer in Support of Caldwell's Motion For Summary Judgment, filed 7-28-09	1158 – 1160	7
Affidavit of Marianne Debban in Support of Caldwell's Motion for Summary Judgment, filed 7-28-09	1161 – 1199	7
Affidavit of Brent Orton in Support of Caldwell's Motion For Summary Judgment, filed 7-28-09	1200 – 1212	7
Counterdefendant Pioneer Irrigation Districts Expert Witness Disclosure, filed 8-10-09	1213 – 1218	7
City of Caldwell's Response to Pioneer Irrigation Districts Motion for Partial Summary Judgment, filed 8-11-09	1219 – 1247	7
Pioneer Irrigation Districts Rebuttal Expert Witness Disclosure, filed 8-24-09	1248 – 1325	8
Plaintiff/Counterdefendant Pioneer Irrigation Districts Second Motion for Partial Summary Judgment, filed 9-1-09	1326 – 1327	8

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Memorandum in Support of Plaintiff/Counterdefendant Pioneer Irrigation Districts Second Motion, etc., filed 9-1-09	1328 – 1344	8
Affidavit of Andrew J Waldera in Support of Pioneers Second Motion for Partial Summary Judgment, filed 9-1-09	1345 – 1384	8
Reply Memorandum in Support of Pioneer Irrigation Districts Motion for Partial Summary Judgment, filed 9-3-09	1385 – 1420	8
Affidavit of Scott L Campbell, filed 9-3-09	1421 – 1447	9
Affidavit of Dylan B Lawrence, filed 9-3-09	1448 – 1472	9
Affidavit of Dawn C Fowler, filed 9-3-09	1473 – 1518	9
Affidavit of William J Mason, filed 9-3-09	1519 – 1522	9
Pioneer Irrigation Districts Supplemental Rebuttal Expert Witness Disclosure, filed 9-9-09	1523 – 1542	9
Affidavit of R Scott Stanfield in Support of Pioneers Response in Opposition to Citys Renewed Motion to Dismiss for Failure to Join, filed 9-11-09	1543 – 1547	9
Pioneers Response Brief in Opposition to Citys Second Motion for Summary Judgment, filed 9-15-09	1548 – 1589	9
Affidavit of Scott L Campbell, filed 9-15-09	1590 – 1622	9
Affidavit of Mark Zirschky in Support of Pioneers Response Brief in Opposition to Citys Second Motion for Summary Judgment, filed 9-15-09	1623 – 1641	10
Affidavit of Andrew J. Waldera, filed 9-15-09	1642 – 1647	10
Affidavit of William J Mason in Opposition to Caldwells Second Motion for Summary Judgment, filed 9-15-09	1648 – 1663	10

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Affidavit of R Scott Stanfield in Support of Pioneers Response in Opposition to Caldwell's Second Motion for Summary Judgment, filed 9-15-09	1664 – 1671	10
City of Caldwell's Third Motion for Summary Judgment, filed 9-23-09	1672 – 1674	10
Affidavit of Counsel in Support of Motion for Third Summary Judgment, filed 9-23-09	1675 – 1788	10
Memorandum in Support of City of Caldwell's Third Motion For Summary Judgment, filed 9-23-09	1789 – 1807	10
Reply Memorandum in Support of City of Caldwell's Second Motion for Summary Judgment, filed 9-24-09	1808 – 1852	11
Affidavit of Erik F Stidham dated September 24, 2009, filed 9-24-09	1853 – 1943	11
Second Affidavit of William J Mason in Opposition to City's Second Motion for Summary Judgment, filed 9-29-09	1944 – 1990	11
Narrative and Delineation of Pioneer Irrigation Districts Tour of its Facilities, filed 9-30-09	1991 – 2000	11
Affidavit of Christian R Petrich, filed 10-7-09	2001 – 2016	12
Affidavit of Jennifer Stevens, filed 10-7-09	2017 – 2059	12
Affidavit of Mark Zirschky in Support of Pioneers Response to City's Third Motion for Summary Judgment, filed 10-7-09	2060 – 2067	12
Affidavit of Andrew J Waldera, filed 10-7-09	2068 – 2083	12
Affidavit of Dylan B Lawrence in Support of Pioneers Response to City's Third Motion for Summary Judgment, filed 10-7-09	2084 – 2187	12
Affidavit of Dylan B Lawrence (Continued), filed 10-7-09	2188 – 2223	13

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Pioneer Irrigation Districts Response to Citys Third Motion For Summary Judgment, filed 10-7-09	2224 – 2259	13
City of Caldwell's Response to Pioneer's Second Motion for Partial Summary Judgment, filed 10-7-09	2260 – 2285	13
Affidavit of Brent Orton Dated Oct 7, 2009, filed 10-7-09	2286 – 2290	13
Affidavit of Scott E Randolph dated Oct 7 2009, filed 10-7-09	2291 – 2375	13
Affidavit of Scott E Randolph (Continued), filed 10-7-09	2376 – 2433	14
Pioneer Irrigation Districts Reply Brief in Support of its Second Motn for Partial Summary Judgment, filed 10-14-09	2434 – 2456	14
Reply Memorandum in Support of Citys Third Motion for Summary Judgment, filed 10-15-09	2457 – 2470	14
Supplemental Brief in Support of Citys Second and Third Motions for Summary Judgment, filed 10-20-09	2471 – 2475	14
Affidavit of Matthew J McGee dated Oct 20, 2009, filed 10-21-09	2476 – 2492	14
Supplemental Written Statement Regarding Urban Stormwater Outfall Identification, filed 11-4-09	2493 – 2500	14
City of Caldwell's Motion for Reconsideration or in the Alternative Clarification, filed 11-4-09	2501 – 2504	14
Memorandum in Support of the Citys Motion for Reconsideration, etc., filed 11-4-09	2505 – 2535	14
City of Caldwell's Motion for Permission to Appeal, filed 11-9-09	2536 – 2538	14
City of Caldwell's Memorandum in Support of Motion for Permission to Appeal, filed 11-9-09	2539 – 2552	15

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Affidavit of Scott E Randolph in Support of Citys Motion for Permission to Appeal, filed 11-9-09	2553 – 2560	15
Pioneers Response in Opposition to Citys Motion for Reconsideration, etc., filed 11-12-09	2561 – 2585	15
Order Re: Pioneers First Motion for Partial Summary Judgment, Citys Second Motion for Summary Judgment, And Citys Renewed Motion to Dismiss, etc., filed 11-12-09	2586 – 2592	15
Pioneers Response to Citys Motion for Permission to Appeal, filed 11-16-09	2593 – 2598	15
Reply in Support of Citys Motion for Reconsideration, etc., filed 11-16-09	2599 – 2612	15
Affidavit of Scott E Randolph, filed 11-17-09	2613 – 2631	15
Citys First Amended Motion for Permission to Appeal, filed 11-18-09	2632 – 2635	15
Citys Reply in Support of First Amended Motion for Permission to Appeal, filed 11-18-09	2636 – 2641	15
Affidavit of Dylan B Lawrence in Response to the Affidavit of Scott E Randolph, filed 11-20-09	2642 – 2651	15
Objection to Proposed Order Approving Citys Motion for Permission to Appeal, filed 12-1-09	2652 – 2663	15
Amended Objection to Proposed Order Approving Citys Motion for Permission to Appeal, filed 12-2-09	2664 – 2668	15
Response to Pioneers Amended Objection to Citys Proposed Order Re Motion for Permission to Appeal, filed 12-3-09	2669 – 2675	15
Order Re City of Caldwells Motion for Permission to Appeal, filed 12-16-09	2676 – 2680	15

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Order Re Objection to Permissive Appeal, filed 12-16-09	2681 – 2683	15
Order Granting Motion to Accept Appeal by Permission, filed 2-2-10	2684 – 2685	15
Order, filed 2-9-10	2686 – 2689	15
Notice of Appeal, filed 2-16-10	2690 – 2694	15
Order Suspending Appeal, filed 2-25-10	2695	15
First Amended Notice of Appeal, filed 2-26-10	2696 – 2701	15
Request for Additional Transcript and Record, filed 3-2-10	2702 – 2713	15
Certificate of Exhibit	2714	15
Certificate of Clerk	2715	15
Certificate of Service	2716	15

INDEX

	Page No.	Vol. No.
Affidavit of Alan Newbill, filed 7-10-09	745 – 765	5
Affidavit of Andrew J Waldera in Support of Pioneers Second Motion for Partial Summary Judgment, filed 9-1-09	1345 – 1384	8
Affidavit of Andrew J Waldera, filed 10-7-09	2068 – 2083	12
Affidavit of Andrew J. Waldera, filed 1-7-09	215 – 224	2
Affidavit of Andrew J. Waldera, filed 9-15-09	1642 – 1647	10
Affidavit of Brent Orton Dated Oct 7, 2009, filed 10-7-09	2286 – 2290	13
Affidavit of Brent Orton in Support of Caldwells Motion For Summary Judgment, filed 7-28-09	1200 – 1212	7
Affidavit of Christian R Petrich, filed 10-7-09	2001 – 2016	12
Affidavit of Counsel in Support of Motion for Third Summary Judgment, filed 9-23-09	1675 – 1788	10
Affidavit of Counsel in Support of Reply to Response to Motion for Partial Summary Judgment, filed 1-20-09	236 – 242	2
Affidavit of Dawn C Fowler, filed 9-3-09	1473 – 1518	9
Affidavit of Debbie Geyer in Support of Caldwells Motion For Summary Judgment, filed 7-28-09	1158 – 1160	7
Affidavit of Dylan B Lawrence (Continued), filed 10-7-09	2188 – 2223	13
Affidavit of Dylan B Lawrence in Response to the Affidavit of Scott E Randolph, filed 11-20-09	2642 – 2651	15
Affidavit of Dylan B Lawrence in Support of Motion for Partial Summary Judgment, filed 7-10-09	456 – 527	3
Affidavit of Dylan B Lawrence in Support of Pioneers Response to Citys Third Motn for Summary Judgment, filed 10-7-09	2084 – 2187	12
Affidavit of Dylan B Lawrence, filed 9-3-09	1448 – 1472	9

INDEX, Continued

	Page No.	Vol. No.
Affidavit of Erik F Stidham dated September 24, 2009, filed 9-24-09	1853 – 1943	11
Affidavit of Jennifer Stevens Ph D, filed 7-10-09	766 – 839	5
Affidavit of Jennifer Stevens, filed 10-7-09	2017 – 2059	12
Affidavit of Marianne Debban in Support of Caldwells Motion for Summary Judgment, filed 7-28-09	1161 – 1199	7
Affidavit of Mark Zirschky in Support of Pioneers Response Brief in Opposition to Citys Second Motion for Summary Judgment, filed 9-15-09	1623 – 1641	10
Affidavit of Mark Zirschky in Support of Pioneers Response to Citys Third Motn for Summary Judgment, filed 10-7-09	2060 – 2067	12
Affidavit of Mark Zirschky, filed 3-12-09	289 – 308	2
Affidavit of Matthew J McGee dated Oct 20, 2009, filed 10-21-09	2476 – 2492	14
Affidavit of Matthew J. McGee, filed 1-7-09	225 – 235	2
Affidavit of R Scott Stanfield in Support of Pioneers Response in Opposition to Citys Renewed Motion to Dismiss for Failure to Join, filed 9-11-09	1543 – 1547	9
Affidavit of R Scott Stanfield in Support of Pioneers Response in Opposition to Caldwells Second Motion for Summary Judgment, filed 9-15-09	1664 – 1671	10
Affidavit of Scott E Randolph (Continued), filed 10-7-09	2376 – 2433	14
Affidavit of Scott E Randolph dated Oct 7 2009, filed 10-7-09	2291 – 2375	13
Affidavit of Scott E Randolph in Support of City of Caldwells Second Motion for Summary Judgment, filed 7-28-09	908 – 1092	6

INDEX, Continued

	Page No.	Vol. No.
Affidavit of Scott E Randolph in Support of Citys Motion for Permission to Appeal, filed 11-9-09	2553 – 2560	15
Affidavit of Scott E Randolph, filed 11-17-09	2613 – 2631	15
Affidavit of Scott E. Randolph (Continued), filed 7-28-09	1093 – 1157	7
Affidavit of Scott L Campbell, filed 9-15-09	1590 – 1622	9
Affidavit of Scott L Campbell, filed 9-3-09	1421 – 1447	9
Affidavit of Steven R. Hannula, filed 3-12-09	309 – 325	2
Affidavit of William J Mason in Opposition to Caldwell's Second Motion for Summary Judgment, filed 9-15-09	1648 – 1663	10
Affidavit of William J Mason, filed 9-3-09	1519 – 1522	9
Amended Complaint for Declaratory and Injunctive Relief, filed 6-20-08	105 – 118	1
Amended Objection to Proposed Order Approving Citys Motion for Permission to Appeal, filed 12-2-09	2664 – 2668	15
Answer Counterclaim and Demand for Jury Trial, filed 2-15-08	42 – 96	1
Answer to Amended Complaint Counterclaim and Demand for Jury Trial, filed 7-9-08	119 – 174	1
Certificate of Clerk	2715	15
Certificate of Exhibit	2714	15
Certificate of Service	2716	15
City of Caldwell's Answer to Second Amended Complaint; Second Amended Counterclaim, etc., filed 5-28-09	340 – 393	2
City of Caldwell's Brief in Support of Motion for Partial Summary Judgment, filed 12-23-08	187 – 195	1

INDEX, Continued

	Page No.	Vol. No.
City of Caldwell's Memorandum in Support of Motion for Permission to Appeal, filed 11-9-09	2539 – 2552	15
City of Caldwell's Motion for Partial Summary Judgment, filed 12-23-08	184 – 186	1
City of Caldwell's Motion for Permission to Appeal, filed 11-9-09	2536 – 2538	14
City of Caldwell's Motion for Reconsideration or in the Alternative Clarification, filed 11-4-09	2501 – 2504	14
City of Caldwell's Reply Brief in Support of Motion for Partial Summary Judgment, filed 1-20-09	243 – 257	2
City of Caldwell's Reply to Second Affidavit of Dylan Lawrence, filed 1-30-09	271 – 274	2
City of Caldwell's Response to Pioneer Irrigation Districts Motion for Partial Summary Judgment, filed 8-11-09	1219 – 1247	7
City of Caldwell's Response to Pioneer's Second Motion for Partial Summary Judgment, filed 10-7-09	2260 – 2285	13
City of Caldwell's Second Motion for Summary Judgment, filed 7-28-09	854 – 856	5
City of Caldwell's Third Motion for Summary Judgment, filed 9-23-09	1672 – 1674	10
City's First Amended Motion for Permission to Appeal, filed 11-18-09	2632 – 2635	15
City's Reply in Support of First Amended Motion for Permission to Appeal, filed 11-18-09	2636 – 2641	15
Complaint for Declaratory and Injunctive Relief, filed 1-16-08	29 – 41	1
Counterdefendant Pioneer Irrigation Districts Expert Witness Disclosure, filed 8-10-09	1213 – 1218	7

INDEX, Continued

	Page No.	Vol. No.
First Amended Notice of Appeal, filed 2-26-10	2696 – 2701	15
Memorandum in Support of City of Caldwell's Second Motion for Summary Judgment, filed 7-28-09	857 – 907	5
Memorandum in Support of City of Caldwell's Third Motion For Summary Judgment, filed 9-23-09	1789 – 1807	10
Memorandum in Support of Motion for Partial Summary Judgment, filed 7-10-09	408 – 455	3
Memorandum in Support of Plaintiff/Counterdefendant Pioneer Irrigation Districts Second Motion, etc., filed 9-1-09	1328 – 1344	8
Memorandum in Support of the City's Motion for Reconsideration, etc., filed 11-4-09	2505 – 2535	14
Motion for Partial Summary Judgment, filed 7-10-09	403 – 407	3
Narrative and Delineation of Pioneer Irrigation Districts Tour of its Facilities, filed 9-30-09	1991 – 2000	11
Notice of Appeal, filed 2-16-10	2690 – 2694	15
Objection to Proposed Order Approving City's Motion for Permission to Appeal, filed 12-1-09	2652 – 2663	15
Order Granting Motion to Accept Appeal by Permission, filed 2-2-10	2684 – 2685	15
Order Re City of Caldwell's Motion for Permission to Appeal, filed 12-16-09	2676 – 2680	15
Order Re Objection to Permissive Appeal, filed 12-16-09	2681 – 2683	15
Order Re: Pioneer's First Motion for Partial Summary Judgment, City's Second Motion for Summary Judgment, And City's Renewed Motion to Dismiss, etc., filed 11-12-09	2586 – 2592	15
Order Regarding City of Caldwell's Motion to Partial Summary Judgment, filed 3-4-09	282 – 285	2

INDEX, Continued

	Page No.	Vol. No.
Order Suspending Appeal, filed 2-25-10	2695	15
Order, filed 2-9-10	2686 – 2689	15
Pioneer Irrigation Districts Rebuttal Expert Witness Disclosure, filed 8-24-09	1248 – 1325	8
Pioneer Irrigation Districts Reply Brief in Support of its Second Motn for Partial Summary Judgment, filed 10-14-09	2434 – 2456	14
Pioneer Irrigation Districts Response to Citys Third Motion For Summary Judgment, filed 10-7-09	2224 – 2259	13
Pioneer Irrigation Districts Supplemental Rebuttal Expert Witness Disclosure, filed 9-9-09	1523 – 1542	9
Pioneers Response Brief in Opposition to Citys Second Motion for Summary Judgment, filed 9-15-09	1548 – 1589	9
Pioneers Response in Opposition to Citys Motion for Reconsideration, etc., filed 11-12-09	2561 – 2585	15
Pioneers Response to Citys Motion for Permission to Appeal, filed 11-16-09	2593 – 2598	15
Plaintiff Pioneer Irrigation Districts Expert Witness Disclosure, filed 7-10-09	528 – 711	4
Plaintiff Pioneer Irrigation Districts Expert Witness Disclosure,(Continued), filed 7-10-09	712 – 744	5
Plaintiff Pioneer Irrigation Districts First Supplemental Expert Witness Disclosure, filed 7-28-09	840 – 853	5
Plaintiff/Counderfendant Pioneer Irrigation Districts Second Motion for Partial Summary Judgment, filed 9-1-09	1326 – 1327	8
Proposed Order Regarding City of Caldwell's Motion to Dismiss for Failure to Join, filed 3-4-09	279 – 281	2
Register of Actions	1 – 28	1

INDEX, Continued

	Page No.	Vol. No.
Reply in Support of Citys Motion for Reconsideration, etc., filed 11-16-09	2599 – 2612	15
Reply Memorandum in Support of City of Caldwells Second Motion for Summary Judgment, filed 9-24-09	1808 – 1852	11
Reply Memorandum in Support of Citys Third Motion for Summary Judgment, filed 10-15-09	2457 – 2470	14
Reply Memorandum in Support of Pioneer Irrigation Districts Motion for Partial Summary Judgment, filed 9-3-09	1385 – 1420	8
Reply to City of Caldwells Amended Counterclaim and Demand for Jury Trial, filed 7-28-08	175 – 183	1
Reply to City of Caldwells Counterclaim, etc., filed 3-18-08	97 – 104	1
Reply to City of Caldwells Second Amended Counterclaim and Demand for Jury Trial, filed 6-17-09	394 – 402	3
Request for Additional Transcript and Record, filed 3-2-10	2702 – 2713	15
Response Brief in Opposition to City of Caldwells Motion For Partial Summary Judgment, filed 1-7-09	196 – 214	2
Response to Pioneers Amended Objection to Citys Proposed Order Re Motion for Permission to Appeal, filed 12-3-09	2669 – 2675	15
Second Affidavit of Dylan B Lawrence, filed 1-28-09	258 – 270	2
Second Affidavit of William J Mason in Opposition to Citys Second Motion for Summary Judgment, filed 9-29-09	1944 – 1990	11
Second Amended Complaint for Declaratory and Injunctive Relief, filed 5-11-09	326 – 339	2
Supplemental Brief in Support of Citys Second and Third Motions for Summary Judgment, filed 10-20-09	2471 – 2475	14

INDEX, Continued

	Page No.	Vol. No.
Supplemental Written Statement Regarding Urban Stormwater Outfall Identification, filed 11-4-09	2493 – 2500	14
Sur-Reply to City of Caldwell's Reply to Second Affidavit of Dylan B Lawrence, filed 2-4-09	275 – 278	2
Written Statement Regarding Urban Storm Water Outfall Identification, filed 3-12-09	286 – 288	2

FILED
A.M. 2:50 P.M.

SEP 03 2009

CANYON COUNTY CLERK
K CANNON, DEPUTY

Scott L. Campbell, ISB No. 2251
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Attorneys for Plaintiff / Counterdefendant
Pioneer Irrigation District

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,
Plaintiff,

vs.

CITY OF CALDWELL,
Defendant.

Case No. CV 08-556-C

AFFIDAVIT OF SCOTT L. CAMPBELL

CITY OF CALDWELL,
Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,
Counterdefendant.

ORIGINAL

STATE OF IDAHO)
) ss.
County of Ada)

Scott L. Campbell, having been duly sworn upon oath, deposes and states as follows:

1. I am licensed to practice law in the State of Idaho. I am one of the attorneys of record for Pioneer Irrigation District ("Pioneer") in the above-captioned matter and have access to the files that are pertinent to this matter. I make this affidavit based upon personal knowledge.

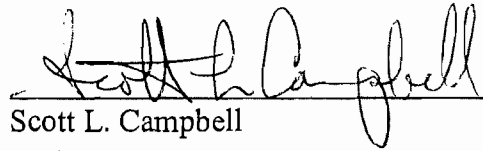
2. I and my firm also represent Settlers Irrigation District. While I am personally not lead trial counsel for Settlers in its litigation against the Ada County Highway District (Case No. CV-OC-0605904, Fourth District, Ada County), I am knowledgeable regarding those proceedings.

3. Attached hereto as Exhibit A is a true and correct copy of the Memorandum of Understanding between Settlers and ACHD, dated July 30, 2009.

4. Attached hereto as Exhibit B is a printout of the Register of Actions for the ACHD v. Settlers litigation as of Wednesday, September 2, 2009, obtained from the Idaho Supreme Court Data Repository website.

5. Attached hereto as Exhibit C is a true and correct copy of the Second Amended Order Setting Proceedings and Trial of August 14, 2009, issued by Judge Wilper in the ACHD v. Settlers proceeding.

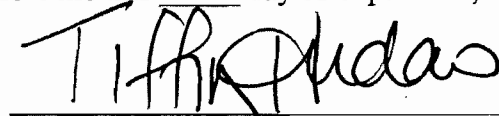
Further your affiant sayeth naught.



Scott L. Campbell

SUBSCRIBED AND SWORN to before me this 3rd day of September, 2009.





NOTARY PUBLIC FOR IDAHO
Residing at Boise
My Commission Expires 9/10/2015

CERTIFICATE OF SERVICE

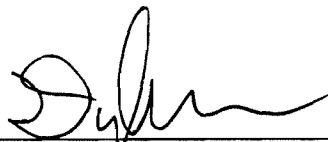
I HEREBY CERTIFY that on this 3rd day of September, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF SCOTT L. CAMPBELL** to be served by the method indicated below, and addressed to the following:

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
1301 12th Avenue
P.O. Box 65
Nampa, ID 83653-0065
Fax: 467-3058

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

J. Fredrick Mack
Erik F. Stidham
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, ID 83701-2527
Fax: 343-8869

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Dylan B. Lawrence



EXHIBIT A
TO AFFIDAVIT OF SCOTT L. CAMPBELL

Walter H. Bithell (ISB # 1206)
Steven C. Bowman (ISB # 4404)
Scott D. Hess (ISB # 2897)
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, Idaho 83701
Telephone: (208) 342-5000
Facsimile: (208) 343-8869

Attorneys for Plaintiff
Ada County Highway District

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

ADA COUNTY HIGHWAY DISTRICT, a
body politic and corporate of the State of
Idaho,

Plaintiff/Counterdefendant,

vs.

SETTLERS IRRIGATION DISTRICT, an
irrigation district organized and existing under
and by virtue of the laws of the State of Idaho,

Defendant/Counterclaimant.

Case No. CV-OC-0605904

**MEMORANDUM OF
UNDERSTANDING**

MEMORANDUM OF UNDERSTANDING

SETTLEMENT POINTS

**ACHD v. Settlers
7/30/2009**

1. Settlers' Irrigation Right-of-way

Settlers' possesses an irrigation right-of-way to the Settlers' Canal and that portion of the North Slough from the diversion point at Five Mile Road to the beginning of the North Slough Lateral No. 1. Settlers' rights-of-way entitle Settlers to exclusive and continuous use of its

MEMORANDUM OF UNDERSTANDING- 1

primary easement, subject to any established prescriptive rights of third parties to the use of the ditch.

2. North Slough Lateral Association

Settlers affirms that it claims no ownership or other right of control over North Slough Lateral No. 1, which is controlled and operated by the North Slough Lateral Association. Settlers agrees that ACHD is free to pursue any and all negotiations and agreements directly with the North Slough Lateral Association, and any other independent lateral association, without the involvement or consent of Settlers.

3. ACHD's Prescriptive Rights

ACHD has prescriptive rights to all outfalls currently discharging into Settlers' facilities. Settlers agrees that all of ACHD's existing outfalls and storm water facilities can remain in place in perpetuity, and the discharges through the existing outfalls can continue at current rates and volumes. Current rates and volumes are defined as storm water generated by a 30-year 24-hour storm event, as measured by the national weather service, over the existing tributary areas described in the attached Exhibit 1.

4. No Additional Storm Water

ACHD agrees that it will not install or permit installation of any new storm water or other outfalls into Settlers' facilities. ACHD further agrees that it will not expand or augment in any way the tributary areas that currently feed into existing outfalls, nor will it construct any additional storm water infrastructure with the potential to contribute to the rates or volumes of storm water that drains from existing outfalls. Subject to the limitations in this paragraph, ACHD reserves the right to maintain, repair, and replace existing outfalls.

5. Future Cooperation

ACHD acknowledges that under this Agreement, ACHD is prohibited from discharging additional storm water over and above current rates and volumes into Settlers' facilities. The parties acknowledge that the costs of improving the Settlers' facilities to handle additional storm water may be substantial. Nothing in the Agreement prohibits the parties from negotiating a feasible plan that allows additional storm water to be discharged into any of Settlers' facilities.

6. Encroachment - Attorney Fees

ACHD will never be required to pay Settlers' transactional attorney fees in any amount in connection with a request made by ACHD for permission to encroach upon Settlers' irrigation right-of-way. ACHD agrees to comply with the requirement of § 42-1209 of obtaining prior written consent from Settlers for any proposed encroachment. In agreeing to comply with § 42-1209, ACHD does not waive any of its existing prescriptive or contractual rights to the use of the Settlers' facilities for storm water drainage.

7. Encroachment - Engineering Fees

MEMORANDUM OF UNDERSTANDING- 2

ACHD will not have to pay engineering fees incurred by Settlers relating to ACHD projects. An exception will be made for large projects that will impact the structural integrity of Settlers' facilities. In such cases, ACHD will only pay reasonable engineering fees incurred by Settlers relating to the review of ACHD's plans.

8. The 66-Inch Pipe Under Maple Grove

The 66-inch infiltration pipe located underneath Maple Grove will not discharge into Settlers' Canal. ACHD shall be authorized to install, at its own cost, a pipe underneath the Settlers Canal to ultimately discharge into the Hyatt Wetlands, subject to Settlers' approval of any proposed engineering plans. Design and construction of the spillway will occur before or concurrent with the design and construction of the redirection of the 66-inch pipe under Settlers Canal. The Maple Grove spillway may be designed to incorporate the 66-inch pipe.

9. NPDES Permit

ACHD will abide by the terms of its NPDES permit related to water quality. Settlers and ACHD agree to work cooperatively in assessing future remedial efforts as identified by Settlers in Exhibit 2.

10. Maple Grove Spillway

- A spillway at or near Maple Grove Road will be constructed to spill into the Hyatt Wetlands.
- ACHD will pay for the design and construction of the spillway.
- The spillway will be designed and constructed to generally accepted engineering and design standards and specifications and shall be subject to approval by Settlers, which approval shall not be unreasonably withheld.
- ACHD will submit design plans for the construction of the spillway to Boise City within eighteen months after execution of this Agreement subject to approval of Settlers.
- The installation of the spillway must be approved by the City of Boise. Settlers agrees to work with ACHD and the City of Boise to secure such approval.
- Construction of the spillway must be completed within four years from the date of this Agreement. If Boise City abandons the Hyatt Wetlands demonstration project, or if construction of the spillway is not completed within four years from the date of this Agreement, which ever first occurs, ACHD agrees to indemnify Settlers against flooding as the result of storm water. The liability will be prorated seventy percent to ACHD and thirty percent to Settlers. This indemnity obligation shall be in place until the construction of either the Maple Grove spillway or an alternative westerly spillway is built between Locust Grove Road and Ten Mile Road.

- ACHD and Settlers may discharge into the Hyatt Wetlands from their respective systems resulting in utilization of the Boise City approved capacity of the Hyatt Wetlands of seventy percent of capacity to ACHD and thirty percent of capacity to Settlers.
- The spillway will be automated. Automated means that flow through the canal at the location of the spillway will be controlled by an acceptable industry standard computerized SCADA system comparable to the system used by Settlers to control water flow at the headgate of the canal. Any additional expense above \$7,300.00 for such automated system will be borne by Settlers.
- Once built and approved by Boise City, Settlers will own, operate, and maintain the spillway.
- Settlers shall pay the design and construction costs associated with any additional structures or features Settlers requests above and beyond ACHD's design.

11. Damages

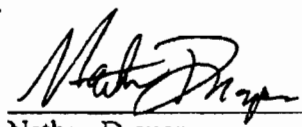
Settlers will pay ACHD \$100,000 in settlement of ACHD's damages claims.


12. Common Law Indemnity

ACHD and Settlers agree to be bound by the application of common law indemnity principles with regard to ACHD's use of the Settlers' Canal for storm water drainage.

13. The Agreement

The parties will memorialize these terms in a settlement agreement. The agreement will include the provision that the litigation between the parties will be dismissed with prejudice, each side to bear its own costs and fees. In addition the parties agree that the terms of paragraph number 10, "Maple Grove Spillway," will be incorporated into the Court's final decree in this matter.


 Nathan Draper
 Subject to Board Approval


 William J. Schweitzer
 Subject to Board Approval

APPROVED AS TO FORM AND CONTENT

MOFFAT THOMAS BARRETT
ROCK & FIELDS, CHARTERED

By 

John Ward
Attorneys for Defendant
Settlers Irrigation District

HOLLAND & HART LLP

By 

Scott D. Hess
Attorneys for Plaintiff/Counterdefendant
Ada County Highway District

MEMORANDUM OF UNDERSTANDING- 5

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of

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SCD Q V

07/30/2009

EXHIBIT B
TO AFFIDAVIT OF SCOTT L. CAMPBELL

Ada

1 Cases Found.

Ada County Highway District vs. Settlers Irrigation District
 Case: **CV-OC-2006-05904** District Filed: **04/03/2006** Subtype: **Other Claims** Judge: **Ronald J. Wilper** Status: **Pending**

Defendants: **Settlers Irrigation District**
 Plaintiffs: **Ada County Highway District**
 Other Parties: **Idaho Water Users Assoc,**

Pending hearings:	Date/Time	Judge	Type of Hearing
	09/03/2009 3:00 PM	Ronald J. Wilper	Motion
	06/22/2010 3:30 PM	Ronald J. Wilper	Pretrial Conference
	06/30/2010 9:00 AM	Ronald J. Wilper	Court Trial

Register Date
of
actions:

04/03/2006 New Case Filed - Other Claims
 04/03/2006 Complaint Filed
 04/03/2006 Summons Filed
 04/06/2006 Motion to Disqualify Without Cause
 04/10/2006 Notice Of Appearance (S Campbell for Settlers Irrigation District)
 04/10/2006 Motion to Dismiss
 04/10/2006 Lodged Memorandum in Dupport of Motion to Dismiss
 04/10/2006 Affidavit of Scott Campbell
 04/11/2006 Order Disqualifying Judge Without Cause
 04/11/2006 Notice of Assignment to Judge Wilper
 04/13/2006 Notice of Hearing on Motion to Dismiss, or in the Alternative, Motion to Strike (6/5/06 @ 2:00PM)
 04/13/2006 Hearing Scheduled (Motion 06/05/2006 02:00 PM)
 04/20/2006 Motion for Limited Admission of Daniel R Frost Pro Hac Vice
 05/15/2006 Notice Of Service
 05/15/2006 Order for Admission Pro Hac Vice
 05/18/2006 Notice Of Service
 05/26/2006 Ada County Highway District's Motion to Amend Complaint
 05/26/2006 Ada County Highway District's Response to Defendant's Motion to Dismiss or Strike
 05/31/2006 Notice Of Service of Discovery Responses
 06/01/2006 Withdrawl of Motion to Dismiss, or in the Alternative, Motion to Strike
 06/01/2006 Notice to Vacate Hearing on Motion to Dismiss/Motion to Strike
 06/01/2006 Hearing result for Motion held on 06/05/2006 02:00 PM: Hearing Vacated
 06/01/2006 Notice Of Service of Discovery
 06/29/2006 Notice Of Hearing Re: Ada Cty Hwy Dist.'s Motion To Amend Complaint
 06/29/2006 Hearing Scheduled (Motion 07/24/2006 11:00 AM) Motion to Amend Complaint
 07/11/2006 Notice of Non-Opposition to Motion to Amend Complaint
 07/21/2006 Stipulation on ACHD's Motion to Amend Complaint
 07/21/2006 Hearing result for Motion held on 07/24/2006 11:00 AM: Hearing Vacated Motion to Amend Complaint
 07/24/2006 Order Granting Motion to Amend Complaint

07/26/2006 Amended Complaint Filed
 08/09/2006 Notice Of Service
 08/14/2006 Answer to Amended Complaint and Counterclaim (Scott Campbell for Settlers Irrigation District)
 08/17/2006 Stipulation for Construction of Maple Grove Bridge
 08/25/2006 Order for Construction of Maple Grove Bridge
 08/30/2006 Reply to Counterclaim
 09/08/2006 Notice of Status Conf
 09/08/2006 Hearing Scheduled (Status 10/10/2006 03:30 PM)
 10/11/2006 Hearing Scheduled (Court Trial 10/31/2007 09:00 AM)
 10/11/2006 Hearing Scheduled (Civil Pretrial Conference 10/23/2007 03:30 PM)
 10/11/2006 Order Setting Proceedings and Trial
 10/16/2006 Motion to Disqualify Potential Alternate Judge
 10/20/2006 Order to Disqualify-McKee
 10/25/2006 Stipulation for Non Waiver of Rights
 10/27/2006 Order on Stip for Non-Waiver
 10/30/2006 Notice Of Service of Discovery Requests
 11/27/2006 Notice Of Service
 11/28/2006 Notice Of Service
 12/22/2006 Settlers Irrigation District's Motion for Leave of Court to File Amended Answer and Amended Counterclaim
 12/22/2006 Settlers Irrigation District's Memorandum in Support of Motion for Leave of Court to File Amended Answer and Amended Counterclaim
 12/22/2006 Notice Of Hearing
 12/22/2006 Hearing Scheduled (Motion 01/22/2007 11:30 AM)
 01/17/2007 Stipulation on Motion for Leave of Court to File Amended Answer and Amended Counterclaim and on Order Settling Proceedings and Trial
 01/17/2007 Notice Vacating Hearing on Motion for leave of Court to File Amended Answer and Amended Counterclaim and on Order Settling Proceedings and Trial
 01/17/2007 Hearing result for Motion held on 01/22/2007 11:30 AM: Hearing Vacated
 02/05/2007 Order to Vacate Trial and Pretrial Deadlines
 02/05/2007 Notice of Status Conf.
 02/05/2007 Hearing Scheduled (Status 03/20/2007 03:30 PM)
 03/16/2007 Stipulation for Entry of Amended Scheduling Order and Motion to Amend Answer and Counterclaim
 03/21/2007 Amended Order Setting Trial Deadlines, Order on Motion to Amend Answer and Counterclaim
 03/21/2007 Hearing Scheduled (Court Trial 07/09/2008 09:00 AM)
 03/21/2007 Hearing Scheduled (Pretrial Conference 07/01/2008 03:30 PM)
 05/08/2007 Settlers Irrigation District's Amended Answer and Amended Counterclaim
 05/17/2007 Reply to Amended Counterclaim
 07/17/2007 Notice Of Service
 07/25/2007 Stipulation and Motion for Leave to File 2nd Amended Complaint
 07/26/2007 Order Granting Motion to File 2nd Amended Complaint
 07/31/2007 Notice Of Service
 08/17/2007 Notice Of Appearance J Thomas for Settlers Irrigation District
 08/20/2007 Second Amended Complaint Filed
 08/29/2007 Motion to Vacate Trial Setting
 09/10/2007 Motion to Intervene (Semanko for Idaho Water Users Association)

09/10/2007 Answer Set for Idaho Water Users Assoc
 09/10/2007 Settlers Irrigation District's Answer and Counterclaim to Ada County Highway District's Second Amended Complaint
 09/19/2007 Notice Of Service
 09/27/2007 Notice Of Service
 10/01/2007 Stipulation to Vacate Trial Setting and Amended Order Setting Pretrial Deadlines and Trial
 10/11/2007 Notice of Hearing Scheduled (Hearing Scheduled 11/05/2007 01:30 PM)
 10/12/2007 Notice Of Service
 10/15/2007 Order to Vacate Trial/Amend Order Setting Deadlines
 10/15/2007 Notice of Status Conf.
 10/15/2007 Hearing Scheduled (Status 11/20/2007 03:30 PM)
 10/22/2007 Affidavit of Erik F Stidham
 10/22/2007 ACHD's Brief in Opposition to Idaho Water Users Associations Motion to Intervene
 10/26/2007 Notice Of Service
 10/31/2007 Notice of Rescheduled Hearing (Motion 11/21/2007 11:00 AM) Motion to Intervene
 11/05/2007 Notice Of Service
 11/19/2007 Notice of Rescheduled Hearing
 11/19/2007 Hearing Scheduled (Motion 12/20/2007 03:00 PM) to Intervene
 11/20/2007 Hearing result for Status held on 11/20/2007 03:30 PM: Hearing Held
 11/21/2007 Hearing Scheduled (Jury Trial 07/29/2009 09:00 AM)
 11/21/2007 Hearing Scheduled (Civil Pretrial Conference 07/21/2009 03:30 PM)
 11/21/2007 Order Setting Proceedings and Trial
 11/21/2007 Notice Of Dismissal Idaho Water Users Association's Joinder in Settlers Irrigation District's Counterclaim
 11/21/2007 Reply in Support of Motion to Intervene
 11/21/2007 Affidavit In Support Of Motion
 11/21/2007 Affidavit In Support Of Motion
 12/20/2007 Hearing result for Motion held on 12/20/2007 03:00 PM: Hearing Held to Intervene
 01/24/2008 Notice Of Service
 01/28/2008 Order Denying Motion to Intervene
 02/05/2008 Amended Order Setting Proceedings and Trial
 02/22/2008 Settlers Irrigation District's Motion to Dismiss
 02/22/2008 Memorandum in Support of Settlers Irrigation District's Motion to Dismiss
 02/22/2008 Notice Of Hearing
 02/22/2008 Hearing Scheduled (Motion 03/20/2008 03:00 PM) Motion to Dismiss
 03/04/2008 Notice Of Service
 03/07/2008 Amended Notice of Hearing on Defendant's Motion to Dismiss (Motion to Dismiss 04/14/2008 03:00 PM) Amended
 03/13/2008 Motion for Leave to File Second Amended Counterclaim
 03/13/2008 Memorandum in Support of Motion for Leave
 03/13/2008 Notice Of Service
 03/20/2008 Hearing result for Motion held on 03/20/2008 03:00 PM: Hearing Vacated Motion to Dismiss
 03/24/2008 Notice of Hearing (Motion 04/21/2008 03:00 PM)
 04/04/2008 ACHD's Response to Settlers Motion to Dismiss
 04/10/2008 Notice Vacating Hearing (04/14/08 @3pm)
 04/11/2008 Second Amended Notice of Hearing on Defendant's Motion to Dismiss

04/11/2008 Hearing re Motion to Dismiss held on 04/14/2008
 03:00 PM: Hearing Vacated Amended
 04/14/2008 ACHDs Brief in Response to Settlers Motion for Leave to
 File Second Amended Counterclaim
 04/14/2008 Affidavit of Erik F Stidham
 Amended Notice of Hearing on Motion for Leave of Court to
 04/17/2008 File First Amended Answer and Second Amended
 Counterclaim
 04/17/2008 Hearing Scheduled (Motion 05/12/2008 01:30 PM)
 04/17/2008 Notice Vacating Hearing
 04/17/2008 Hearing result for Motion held on 04/21/2008 03:00 PM:
 Hearing Vacated
 04/25/2008 Reply to Motion to Dismiss
 04/25/2008 Motion for Leave to File Memo in Excess of Page Limit
 04/25/2008 Affidavit In Support Of Motion for Leave to File Memo in
 Excess of Page Limit
 Settlers Irrigation District's Motion for Leave from Local Rule
 05/07/2008 8.1 to File Over Length Reply Brief in Support of Motion for
 leave to File Second Amended Counterclaim
 05/07/2008 Affidavit of Nathan Draper
 05/07/2008 Affidavit of John C Ward
 05/07/2008 Reply Brief in Support of Motion for Leave to File Second
 Amended Counterclaim
 05/12/2008 Hearing Scheduled (Motion to Amend 05/29/2008 03:30
 PM)
 05/12/2008 Notice Vacating Hearing
 05/12/2008 Notice of Hearing (5/29/08 @ 3:30 pm)
 05/12/2008 Hearing result for Motion held on 05/12/2008 01:30 PM:
 Hearing Vacated
 05/27/2008 ACHD's Supplemental Brief in Response to Settlers' Motion
 for Leave to File Second Amended Counterclaim
 05/28/2008 Hearing result for Motion to Amend held on 05/29/2008
 03:30 PM: Hearing Vacated
 05/28/2008 Stipulation to Vacate Hearing
 Third Amended Notice Of Hearing on Motion for Leave of
 05/29/2008 Court to File First Amended Answer and Second Amended
 Counterclaim 6.9.08 @ 2:30pm
 05/29/2008 Hearing Scheduled (Motion 06/09/2008 02:30 PM) Motion
 for Leave to file amended answer and counterclaim
 06/03/2008 Notice Of Taking Deposition
 06/03/2008 Notice Of Taking Deposition
 Settlers Irrigation District's Motion for Leave to From Local
 06/04/2008 Rule 8.1 to File Over Length Sur Reply Brief in Support of
 Motion for Leave to File Second Amended Counterclaim
 06/04/2008 Supplemental Affidavit of Nathan Draper
 06/04/2008 Supplemental Affidavit of John C Ward
 Settlers Irrigation District's Sur Reply RE its Motion for
 06/04/2008 Leave of Court to File First Amended Answer and Second
 Amended Counterclaim
 06/05/2008 Affidavit Of Service (6/4/08)
 06/05/2008 (2) Notice Of Taking Deposition
 Hearing result for Motion held on 06/09/2008 02:30 PM:
 06/09/2008 District Court Hearing Held Court Reporter: cromwell
 Number of Transcript Pages for this hearing estimated: 50
 Motion for Leave to file amended answer and counterclaim
 06/12/2008 Order For Leave to File 2nd Amended Counterclaim
 06/13/2008 Order Denying Rule 12(b)(6) Motion to Dismiss
 06/17/2008 Sheriff's Return of Service 6.11.08
 06/19/2008 Amended Notice of Deposition
 06/19/2008 1st Amended Answer to ACHD's 2nd Amended Complaint

and County Court (Ward for Settler's Irrigation District)

06/20/2008 Notice of Errata

Settlers Irrigation Districts First Amended Answer to Ada

06/20/2008 County Highway Districts Second Amended Complaint and
Second Amended Counterclaim

06/24/2008 Notice Of Service

07/01/2008 Notice of Continued Deposition Duces Tecum of Troy Miller

07/03/2008 Notice Of Service

07/03/2008 Notice Of Taking Deposition of Dorrell Hansen

07/03/2008 Notice Of Taking Deposition of Dale Kuperus

07/15/2008 Reply to Second Amended Counterclaim

07/22/2008 Second Amended Notice of Deposition Duces Tecum of
Dorrell Hansen

07/22/2008 Notice Of Second Continued Deposition

07/23/2008 Notice Of Service

07/30/2008 Affidavit Of Service (07/23/08)

08/07/2008 Notice Of Service

08/08/2008 Notice Of Service

08/13/2008 Second Amended Notice of Deposition

08/26/2008 Notice Of Service

09/03/2008 Notice Of Service

09/26/2008 Settlers Irrigation District's Notice Of Taking Deposition of
ACHD

09/29/2008 (2) Notice Of Service

10/06/2008 Notice Of Service

10/07/2008 Notice Of Service

10/17/2008 Settlers Irrigation District's Amended Notice of Rule 30 (b)
(6) Deposition of the Ada County Highway District

10/28/2008 Notice Of Service

10/28/2008 Notice Of Deposition Duces Tecum of Kent Brown

10/31/2008 Amended Notice of Deposition

10/31/2008 Motion for Leave to File Third Amended Complaint

10/31/2008 Affidavit of Walter H Bithell in Support of Motion

10/31/2008 Brief By ACHD in Support of Motion

10/31/2008 Notice of Hearing Scheduled (Motion 11/17/2008 11:30 AM)
for Leave to File Third Amended COmplaint

11/10/2008 Affidavit of John C Ward

11/10/2008 Memorandum in Opposition to Motion for Leave to File Third
Amended Complaint

11/13/2008 ACHDs Motion to Strike

11/13/2008 Reply Brief by ACHD in Support of Motion for Leave to File
Third Amended Complaint

11/13/2008 Affidavit of Scott D Hess in Support of Plaintiff's Reply Brief
on Motion for Leave to File Third Amended Complaint

11/14/2008 Second Amended Notice of Deposition

11/14/2008 Settlers Irrigation District's Memorandum in Opposition to
ACHD'S Motion to Strike

11/17/2008 Second Affidavit of John C. Ward

Hearing result for Motion held on 11/17/2008 11:30 AM:

11/17/2008 District Court Hearing Held Court Reporter: cromwell
Number of Transcript Pages for this hearing estimated: for
Leave to File Third Amended COmplaint-50

12/03/2008 Notice of Deposition of Art Jenkins

12/15/2008 ACHDs Motion for Partial Summary Judgment

12/15/2008 Affidavit of Russ Davis in Support of ACHDs Motion

12/15/2008 Affidavit of Dorrell R Hansen

12/15/2008 Affidavit of Counsel

12/15/2008 ACHDs Brief in Support of Motion

12/15/2008 Notice Of Hearing (01/26/09 @ 2:00pm)
 12/15/2008 Hearing Scheduled (Hearing Scheduled 01/26/2009 02:00 PM) Motion for Partial Summary Judgment
 12/19/2008 Settlers Irrigation District's Rule 56(f) Motion and Request for Status Conference
 12/19/2008 Affidavit In Support Of Motion
 12/19/2008 Notice Of Hearing
 12/19/2008 Hearing Scheduled (Status 01/12/2009 11:30 AM) Status Conference
 12/22/2008 Amended Notice Of Hearing on Settlers Irrigation District's Rule 56(f) Motion and request for Status Conference 1.5.09 @ 11 am
 12/22/2008 Hearing Scheduled (Motion 01/05/2009 11:00 AM)
 12/24/2008 Order Granting Leave to File Third Amended Complaint
 12/29/2008 ACHDs Brief in Opposition to Motion
 12/30/2008 Third Amended Complaint
 01/05/2009 Hearing result for Motion held on 01/05/2009 11:00 AM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated:50
 01/09/2009 Settlers Irrigation Districts Answer to Ada County Highway Districts Third Amended Complaint
 01/12/2009 Settler Irrigation District's Motion for Leave from Local Rule 8.1 to File Overlength Brief
 01/12/2009 Affidavit of Nathan Draper in Support of Settlers Irrigation District's Opposition to ACHD's Motion for Partial Summary Judgment
 01/12/2009 Affidavit of Kimberly Evans Ross
 01/12/2009 Memorandum in Opposition to ACHD's Motion for Partial Summary Judgment
 01/15/2009 Settlers' Irrigation District's Motion for Partial Summary Judgment RE: ACHD's Claims for Damages
 01/15/2009 Memorandum in Support of Settlers' Irrigation District's Motion for Partial Summary Judgment RE: ACHD's Claims for Damages
 01/15/2009 Affidavit of Craig R. Yabui in Support of Settlers' Irrigation District's Motion for Partial Summary Judgment RE: ACHD's Claims for Damages
 01/15/2009 Motion for Leave to File Memorandum in Excess of Page Limit
 01/15/2009 Affidavit in Support of Motion for Leave to File Memorandum in Excess of Page Limit
 01/15/2009 Notice Of Hearing on Settlers' Irrigation District's Motion for Partial Summary Judgment RE: ACHD's Claims for Damages
 01/15/2009 Hearing Scheduled (Motion for Partial Summary Judgment 02/23/2009 04:00 PM) RE: ACHD's Claims for Damages
 01/20/2009 Motion and Supporting Memo for Leave to File Over-Length Reply Brief
 01/20/2009 Second Affidavit for Partial Summary Judgment (2)
 01/21/2009 Brief in Support of Motion for Partial Summary Judgment
 01/21/2009 (3) Orders Granting Over-Length Briefing
 01/22/2009 Second Affidavit of Kimberly Evans Ross
 01/23/2009 Amended Notice of Hearing on Settlers' Irrigation District's Motion for Partial Summary Judgment Re: ACHD'S Claims for Damages (03/02/09@1:30PM)
 01/23/2009 Hearing Scheduled (Motion for Partial Summary Judgment 03/02/2009 01:30 PM) Amended
 01/23/2009 Notice of Supplemental Authority
 01/26/2009 Second Notice of Supplemental Authority
 01/26/2009 Hearing result for Hearing Scheduled held on 01/26/2009 02:00 PM: District Court Hearing Held Court Reporter:

cromwell Number of Transcript Pages for this hearing
estimated: Motion for Partial Summary Judgment=50

01/30/2009 Objection to Proposed Order on Settlers' Rule 56(f) Motion

02/09/2009 Settlers Irrigation District's Notice of Deposition of the Ada
County Highway District

02/12/2009 (2)Notice Of Service

02/17/2009 Brief in Opposition to Motion for Partial Summary Judgment

02/17/2009 Affidavit in Opposition to Motion for Summary Judgment

02/17/2009 Affidavit of Dorrell Hansen in Opposition to Motion for
Summary Judgment

02/17/2009 Motion for Leave to File Over Length Brief Opposing
Settlers Motion for Summary Judgment

02/19/2009 Second Amended Notice Of Hearing on Settlers Irrigation
Districts Motion for Partial Summary Judgment RE: ACHDs
Claims for Damages

02/19/2009 Hearing Scheduled (Hearing Scheduled 03/16/2009 01:30
PM)

02/20/2009 Order Granting Motion to File Over-Length Brief

02/20/2009 Notice Of Service

03/09/2009 Motion to Extend Time to File Affidavits in Support of Motion
for Summary Judgment Re: ACHD's Claims for Damages
filed January 15, 2009

03/09/2009 Affidavit In Support Of Motion to Extend Time to File
Affidavits in Support of Motion for Summary Judgment Re:
ACHD's Claims for Damages filed January 15, 2009

03/09/2009 Motion for Leave to File Reply to ACHD's Brief in Opposition
to Motion for Partial Summary Judgment on Damage Claims
in Excess of Page Limit

03/09/2009 Affidavit In Support Of Motion for Leave to File Reply to
ACHD's Brief in Opposition to Motion for Partial Summary
Judgment on Damage Claims in Excess of Page Limit

03/09/2009 Motion to Shorten Time

03/09/2009 Affidavit of Nathan Draper

03/09/2009 Affidavit of Jeffrey A Thompson

03/09/2009 Reply in Opposition to Motion for Partial Summary
Judgment

03/09/2009 Notice of Hearing (Motions 03/16/2009 01:30 PM)

03/12/2009 Order Granting Leave to File Memorandum in Excess of Pg.
Limit

03/12/2009 Memorandum Decision and Order

03/16/2009 Hearing result for Hearing Scheduled held on 03/16/2009
01:30 PM: District Court Hearing Held Court Reporter:
cromwell Number of Transcript Pages for this hearing
estimated:50

03/18/2009 Notice Of Service

03/31/2009 Stipulation of Counsel

03/31/2009 ACHD's Supplemental Brief in Opposition to Settler's Motion
for Partial Summary Judgment on Damages

03/31/2009 Affidavit of Scott D Hess in Support of ACHD's
Supplemental Brief

03/31/2009 ACHD's Disclosure of Expert Witnesses

04/02/2009 Order on Stipulation

04/03/2009 Motion to Renew ACHD's Motion for Summary Judgment

04/03/2009 Affidavit of Scott D Hess in Support of ACHD's Renewed
Motion for Summary Judgment

04/03/2009 Notice Of Hearing 5.4.09 @ 11:30 am

04/03/2009 Hearing Scheduled (Motion 05/04/2009 11:30 AM)

04/06/2009 Brief in Support of ACHD's Renewed Motion for Partial
Summary Judgment

04/07/2009 Reply to ACHD's Supplemental Brief in Opposition to
Settlers' Motion for Partial Summary Judgment on Damages

Affidavit of R Yabul in Support of ACHD's
 04/07/2009 Supplemental Brief in Opposition to Settlers' Motion for
 Partial Summary Judgment on Damages
 04/14/2009 Notice Of Service
 04/20/2009 Notice Of Service
 04/20/2009 Motion for Leave from Local Rule to File Overlength Brief
 04/20/2009 Motion For Partial Summary Judgment
 04/20/2009 Affidavit of Kimberly Evans Ross
 04/20/2009 Affidavit of Jennifer Stevens
 04/20/2009 Affidavit of David B Shaw
 Memorandum in Support of Second Motion for Partial
 04/20/2009 Summary Judgment and Response to Motion for Partial
 Summary Judgment
 04/23/2009 Order for Leave to File Overlength Brief
 04/23/2009 Notice Of Taking Deposition
 04/23/2009 Notice Of Service
 04/27/2009 Notice of Hearing Scheduled (Motion for Summary
 Judgment 05/29/2009 03:00 PM)
 04/27/2009 Notice Of Service
 ACHDs Motion and Supporting Memorandum for Leave to
 04/27/2009 File Overlength Reply Brief in Support of Renewed Motion
 for Partial Summary Judgment
 04/27/2009 Second Affidavit of Scott D Hess
 04/28/2009 Second Affidavit of Russ Davis
 04/28/2009 ACHDs Second Motion for Partial Summary Judgment
 04/28/2009 Affidavit of Charles E Sweeney
 04/28/2009 Affidavit of Dorrell R Hansen
 04/28/2009 Brief by ACHD in Support of Second Motion for Partial
 Summary Judgment
 ACHDs Motion and Supporting Memorandum for Leave to
 04/28/2009 File Over-Length Brief in Support of Second Motion for
 Partial Summary Judgment
 04/28/2009 Notice Of Hearing (05/28/09 @ 3:00pm)
 04/28/2009 Hearing Scheduled (Hearing Scheduled 05/28/2009 03:00
 PM) Second Motion for Partial Summary Judgement
 04/29/2009 Order Granting Motion to File Overlength Brief
 04/29/2009 Reply Brief in Support of ACHD's Renewed Motion for
 Partial Summary Judgment
 04/30/2009 Memorandum Decision and Order on Defendant's Motion
 for Partial Summary Judgment on Damage Claims
 05/01/2009 Notice Of Service
 05/01/2009 Settlers Irr Reply in Opposition to ACHDs Renewed Motion
 for Partial Summary Judgment
 05/01/2009 Third Affidavit of Scott D Hess
 05/04/2009 Order for Leave to File Overlength Brief
 Hearing result for Motion held on 05/04/2009 11:30 AM:
 05/04/2009 District Court Hearing Held Court Reporter: cromwell
 Number of Transcript Pages for this hearing estimated:50
 05/04/2009 Notice of Supplemental Authority
 05/04/2009 Notice Of Service
 05/04/2009 Response to Surreply in Opposition to Renewed Motion for
 Partial Summary Judgment
 Settlers Irrigations Motion for Partial Summary Judgment re
 05/04/2009 Damages - ACHDs Claims for Interference with Property
 Rights and Indemnity
 05/04/2009 Affidavit of Nathan Draper
 05/04/2009 Third Memorandum in Support of Motion
 05/04/2009 Notice Of Hearing (06/01/09 @ 1:30pm)
 05/04/2009 Hearing Scheduled (Hearing Scheduled 06/01/2009 01:30

PM) Motion for Partial Summary Judgment

05/05/2009 ACHDs Disclosure of Responsive Expert Witnesses

05/06/2009 Settlers' Irrigation District's Motion for Relief from Amended Order Setting Proceedings and Trial

05/06/2009 Affidavit of Craig R. Yabui in Support of Motion for Relief From Amended Order

05/06/2009 Memorandum in Support of Motion for Relief from Amended Order

05/07/2009 Notice Of Service

05/07/2009 Order Granting Relief from Order Setting Proceedings and Trial

05/08/2009 Notice Of Service

05/08/2009 Notice Of Taking Deposition

05/08/2009 Notice Of Continued Deposition

05/11/2009 Notice Of Service

05/11/2009 Plaintiff's Witness List

05/13/2009 ACHDs Disclosure of Responsive Expert Witness Patrick L Pettiette

05/14/2009 Settlers' Irrigation District's Motion for Clarification of Memorandum Decision and Order RE: Motion for Partial Summary Judgment RE: Damages

05/14/2009 Memorandum in Support of Settlers' Irrigation District's Motion for Clarification of Memorandum Decision and Order RE: Motion for Partial Summary Judgment RE: Damages

05/14/2009 Notice Of Hearing on Settlers' Irrigation District's Motion for Clarification of Memorandum Decision and Order RE: Motion for Partial Summary Judgment RE: Damages (5-29-09 3:00pm)

05/14/2009 ACHD'S Disclosure of Expert Witnesses

05/14/2009 Settlers Irrigation District's Motion for Leave to File Overlength Brief

05/14/2009 Third Affidavit of John C Ward

05/14/2009 Affidavit of Scott L Campbell

05/14/2009 Response in Opposition to ACHD's Second Motion for Partial Summary Judgment

05/15/2009 Order for Leave to File Overlength Brief

05/15/2009 Notice of Continued Duces Tecum

05/15/2009 Motion for Reconsideration of the Court Memorandum Decision and Order Dated April 30, 2009

05/15/2009 Affidavit of Scott D Hess

05/15/2009 ACHDs Brief in Opposition to Settlers Second Motion for Partial Summary Judgment filed April 20, 2009

05/15/2009 ACHD's Motion and Supporting Memorandum for Leave to File Overlength Brief in Opposition to Settlers Second Motion for Partial Summary Judgment

05/15/2009 Notice Of Hearing (06/01/09 @ 1:30pm)

05/18/2009 Motion in Limine

05/18/2009 Affidavit of John C Ward

05/18/2009 Memorandum of Law in Support of Motion

05/18/2009 Motion for Order Shortening Time

05/18/2009 Affidavit of Scott D Hess in Support of ACHD's Motion to Reconsider and/or Motion for Clarification

05/18/2009 ACHD's Brief in Support of Motion to Reconsider and/or Motion for Clarification

05/18/2009 Affidavit of Scott D Hess in Opposition to Settlers' Third Motion for Partial Summary Judgment

05/18/2009 ACHD's Brief in Opposition to Settlers' Third Motion for partial Summary Judgment

05/19/2009 Amended Notice of Continued Deposition Duces Tecum of Gordon Smith

05/19/2009 Notice Of
 Reply to ACHD's Brief in Opposition to Settler's Third Motion
 05/22/2009 for Partial Summary Judgment Re: Interference with
 Property Rights and Common Law Indemnity
 05/22/2009 Settlers' Irrigation District's Opposition to ACHD's Motion to
 Reconsider and/or Motion for Clarification
 Affidavit of Craig R. Yabui in Support of Settlers' Irrigation
 05/22/2009 District's Opposition to ACHD's Motion to Reconsider and/or
 Motion for Clarification
 05/22/2009 ACHD's Brief in Opposition to Settlers' Motion for
 Clarification
 Settlers Irrigation District's Motion for Leave to File
 05/22/2009 Overlength Reply Brief in Support of Second Motion for
 Partial Summary Judgment
 05/22/2009 Affidavit of Rebecca A Rainey
 05/22/2009 Settler Irrigation District's Reply Memorandum in Support of
 Second Motion for partial Summary Judgment
 05/26/2009 Reply to ACHD's Brief in Opposition to Settlers' Motion for
 Clarification Filed May 14, 2009
 05/27/2009 (2) Orders Allowing Overlength Brief
 05/27/2009 Order to Shorten Time
 05/27/2009 Continued (Motion for Summary Judgment 05/29/2009
 02:00 PM)
 05/27/2009 Notice of Withdrawal of Settlers Irrigation Motion in Limine
 05/27/2009 Amended Notice Of Hearing (05/29/2009 02:00 PM) ACHD
 Second Motion for Partial Summary Judgment
 05/28/2009 Reply Brief in Support of Motion to Reconsider or Motion for
 Clarification
 Hearing result for Motion for Summary Judgment held on
 05/29/2009 02:00 PM: District Court Hearing Held Court
 05/29/2009 Reporter: cromwell Number of Transcript Pages for this
 hearing estimated:100
 06/01/2009 Defendant's Witness List
 Hearing result for Hearing Scheduled held on 06/01/2009
 01:30 PM: District Court Hearing Held Court Reporter:
 06/01/2009 cromwell Number of Transcript Pages for this hearing
 estimated: Motion for Partial Summary Judgment-50 Motion
 for Reconsideration of Courts Decision
 06/10/2009 Notice Of Service
 06/11/2009 (4) Notice Of Service
 06/12/2009 Notice Of Service
 06/12/2009 (2) Notices Of Service
 06/15/2009 Notice Of Service
 06/18/2009 Notice of Vacating Deposition Duces Tecum of Barbara
 Perry Bauer
 06/23/2009 Notice of Vacating Deposition
 06/24/2009 Notice Of Service
 06/24/2009 Notice of Vacating Deposition
 06/24/2009 (3) Notice Of Service
 06/29/2009 Findings of Fact, Conclusions of Law, and Order on Pending
 Motions
 06/30/2009 (2) Notice Vacating Deposition
 07/07/2009 ACHDs Disclosure of Rebuttal Expert Witness Daniel I
 Gregory PG
 07/07/2009 ACHDs Disclosure of Rebuttal Expert Witness Charles E
 Sweeney PE
 07/13/2009 Stipulation of Counsel
 07/13/2009 Notice Of Service
 07/15/2009 (2) Notice Of Service
 07/16/2009 Notice Of Service

07/16/2009 ACHDs Pretrial Memorandum
 07/16/2009 Motion for Leave to File Overlength Pre Trial Brief
 07/16/2009 Pre-Trial Brief
 07/17/2009 Order to File Overlength Brief
 07/17/2009 Notice Of Service
 07/17/2009 Notice Of Service
 07/20/2009 ACHD's Disclosure of Rebuttal Expert Witnesses
 07/21/2009 Plaintiffs Trial Exhibit List
 07/21/2009 Hearing result for Civil Pretrial Conference held on
 07/21/2009 03:30 PM: Hearing Held
 07/21/2009 Plaintiff's Witness List
 07/21/2009 Motion for Rule 54 (b) Certification and to vacate Trial
 07/21/2009 Memorandum in Support of Motion for Rule 54 (b)
 Certification and to Vacate Trial
 07/21/2009 Supplementation of Discovery and record
 07/22/2009 Defendant's Exhibit List
 07/22/2009 Defendant's Witness List
 07/22/2009 Hearing result for Court Trial held on 07/29/2009 09:00 AM:
 Continued
 07/22/2009 Hearing Scheduled (Court Trial 08/03/2009 09:00 AM) 4
 weeks
 07/22/2009 Stipulation of Counsel
 07/24/2009 Order Resetting Trial
 07/24/2009 Notice Of Service
 07/28/2009 Second Stipulation of Counsel RE: Trial Setting
 07/29/2009 Order to Reset Trial
 07/29/2009 Continued (Court Trial 08/05/2009 09:00 AM) 4 weeks
 07/30/2009 Settlers' Amended Exhibit List for Trial
 Hearing result for Court Trial held on 08/05/2009 09:00 AM:
 08/05/2009 District Court Hearing Held Court Reporter: cromwell
 Number of Transcript Pages for this hearing estimated: 4
 weeks-50
 08/05/2009 Hearing Scheduled (Status 08/14/2009 10:00 AM)
 08/14/2009 2nd Amended Order Setting Proceedings and Trial
 08/14/2009 Hearing Scheduled (Court Trial 06/30/2010 09:00 AM) 1
 month trial
 08/14/2009 Hearing Scheduled (Pretrial Conference 06/22/2010 03:30
 PM)
 08/17/2009 Motion to Enforce Settlement Agreement
 08/17/2009 Affidavit of Scott Hess in Support of Motion
 08/17/2009 Memorandum in Support of Motion to Enforce
 08/17/2009 Notice of Hearing Scheduled (Motion 09/03/2009 03:00 PM)
 08/25/2009 Settlers' Memorandum in Opposition to ACHD's Motion to
 Enforce Settlement Agreement
 08/25/2009 Affidavit of Nathan Draper

Connection: Public



EXHIBIT C
TO AFFIDAVIT OF SCOTT L. CAMPBELL

AUG 14 2009

J. DAVID NAVARRO, Clerk
By INGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ADA COUNTY HIGHWAY DISTRICT, a
body politic and corporate of the State of
Idaho,

Plaintiff/Counterdefendant,

vs.

SETTLERS' IRRIGATION DISTRICT, an
irrigation district organized and existing
under and by virtue of the laws of the State
of Idaho,

Defendant/Counterclaimant.

Case No. CVOC0605904

SECOND AMENDED
ORDER SETTING PROCEEDINGS
AND TRIAL

On August 5, 2009, the parties appeared at the Status Conference and informed the Court that the case had settled. The parties presented the Court with a Memorandum of Understanding but admitted that the final settlement documents had not yet been drafted. The parties agreed to continue to work toward resolving the details of the Settlement Agreement and agreed to a deadline of 10:00 a.m. Friday, August 14, 2009, to have the final settlement document prepared and executed.

RECEIVED

AUG 17 2009

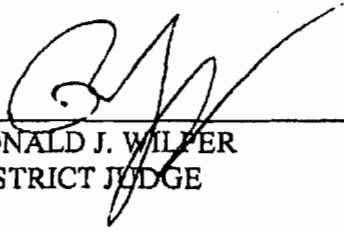
MOFFATT, THOMAS, BARRETT,
ROCK & FIELDS, CHTD.

Early on the morning of August 14, 2009, Mr. Ward, attorney for Settlers' Irrigation District, contacted the Clerk of the Court to inform the Court the parties had been unable to reach an agreement and would be requesting the Court to reset the matter for a court trial.

IT IS HEREBY ORDERED AND THIS DOES ORDER that the Amended Order Setting Proceedings and Trial dated February 5, 2008, is amended, and the trial is reset for a one (1) month court trial commencing at 9:00 a.m., Wednesday, June 30, 2010. A pretrial conference will be held on June 22, 2010 at 3:30 p.m. All of the other provisions of the Amended Order Setting Proceedings and Trial are unaffected by the change of trial date.

IT IS SO ORDERED.

Dated this 14th day of August, 2009.



RONALD J. WILPER
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on August 14, 2009 I mailed a true and correct copy of the within instrument to:

Walter H. Bithell
HOLLAND & HART LLP
101 S Capitol Blvd, Ste 1400
PO Box 2527
Boise, ID 83701-2527

John C. Ward
MOFFATT THOMAS BARRETT
ROCK & FIELDS CHARTERED
101 S Capitol Blvd, 10th Fl
PO Box 829
Boise, ID 83701-0829

Jeffrey A. Thomson
ELAM & BURKE PA
251 E Front St, Ste 300
PO Box 1539
Boise, ID 83701-1539

J. DAVID NAVARRO
Clerk of the District Court

By:  **INGA JOHNSON**
Deputy Court Clerk

FILED
A.M. 2:51 P.M.

SEP 03 2009

**CANYON COUNTY CLERK
K CANNON, DEPUTY**

Scott L. Campbell, ISB No. 2251
Bradley J Williams, ISB No. 4019
Tara Martens, ISB No. 5773
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
18946.0059

Attorneys for Plaintiff / Counterdefendant
Pioneer Irrigation District

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

AFFIDAVIT OF DYLAN B. LAWRENCE

ORIGINAL

STATE OF IDAHO)
) ss.
County of Ada)

Dylan B. Lawrence, having been duly sworn upon oath, deposes and states as follows:

1. I am an attorney duly licensed to practice law in the state of Idaho. I am one of the attorneys representing Pioneer Irrigation District ("Pioneer") in the above-referenced matter. I have access to the client's files in this matter, and make this affidavit based upon my personal knowledge.

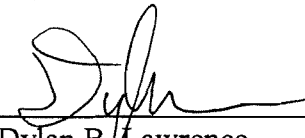
2. Attached hereto as Exhibit A is a true and correct copy of correspondence from Mark Hilty to U.S. Bureau of Reclamation, dated September 14, 2007, Bates numbered COC003110 – COC003116 .

3. Attached hereto as Exhibit B are true and correct copies of relevant excerpts from the deposition transcript of Pioneer Superintendent Jeff Scott.

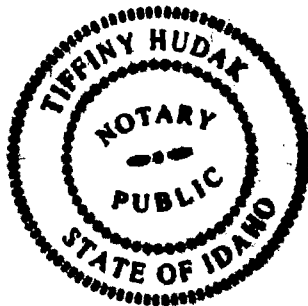
4. Attached hereto as Exhibit C are true and correct copies of relevant excerpts from the deposition transcript of Pioneer Board Member Alan Newbill.

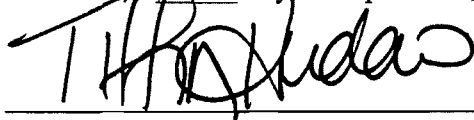
5. Attached hereto as Exhibit D are true and correct copies of relevant excerpts from the deposition transcript of Pioneer Board Member Leland Earnest.

Further your affiant sayeth naught.


Dylan B. Lawrence

SUBSCRIBED AND SWORN to before me this ^{3rd} day of September, 2009.




NOTARY PUBLIC FOR IDAHO
Residing at Boise
My Commission Expires 9/16/2015

CERTIFICATE OF SERVICE

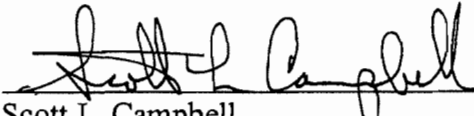
I HEREBY CERTIFY that on this 3rd day of September, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF DYLAN B. LAWRENCE** to be served by the method indicated below, and addressed to the following:

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
1301 12th Avenue
P.O. Box 65
Nampa, ID 83653-0065
Fax: 467-3058

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

J. Fredrick Mack
Erik F. Stidham
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, ID 83701-2527
Fax: 343-8869

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

EXHIBIT A

to

AFFIDAVIT OF DYLAN B. LAWRENCE

Pioneer v. City of Caldwell

Case No. CV-2008-556-C

2010-96

HAMILTON, MICHAELSON & HILTY, LLP

ATTORNEYS AT LAW
1303 - 12th AVENUE ROAD
P.O. BOX 65
NAMPA, IDAHO 83653-0065

CARL D. HAMILTON
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MARK HILTY

RON SHEPHERD
BRYAN K. WALKER
TERI A. KAPTEIN
DANIELLE S. LARIMER
AARON L. SEABLE
ELIZABETH L.S. BOWEN
MELISSA MOODY
MARK OLSON
BRYAN TAYLOR

TELEPHONE
(208) 467-4479

FACSIMILE
(208) 467-3058

E-MAIL
CivilLaw@nampalaw.com

September 14, 2007

U.S. Bureau of Reclamation
Snake River Area Office
Attn: Gretchen Fitzgerald
230 Collins Road
Boise, Idaho 83702-4520

*Re: Draft Environmental Assessment for Proposed Transfer of USBR Drainage Facilities to
Pioneer Irrigation District*

Dear Ms. Fitzgerald:

I write on behalf of my client, the City of Caldwell, Idaho. The purpose of this letter is to comment on the draft Environmental Assessment (EA) dated August 2007 concerning the proposed transfer of U.S. Bureau of Reclamation (USBR) drainage facilities to Pioneer Irrigation District (PID).

Current Situation

According to the map included in the EA at Figure 1, virtually all of the facilities proposed for transfer to PID are located within the city limits or areas of city impact for Caldwell and Nampa. I understand that Nampa will be commenting on the draft EA as well. Caldwell wishes to acknowledge our joint interests in this matter with Nampa and support constructive resolution of Nampa's concerns. The EA documents that the area surrounding the drains is rapidly urbanizing and existing land use plans "anticipate conversion of all lands within the city AOIs (see Figure 1) to urban/suburban uses."

The EA also documents current, existing and active storm water discharges from urban areas into the subject drains. EA at p.18. This appears to be consistent with the capacity and purpose of the drains, all of which were "designed, sized and constructed to manage instances of high ground water levels, irrigation return flows and storm water runoff from agricultural fields."¹ While many of the lands devoted to agriculture have been and will continue to be converted to urban areas, such conversion obviously does not modify the capacity of the drains. The distinction between urban areas and agricultural fields with respect to storm water runoff and flood risk is addressed in more detail later in this letter.

While the EA seems to indicate that the transfer will not effect a change regarding urban storm water management policy, this oversimplifies an important distinction between USBR and PID. In Appendix B, the EA sets forth USBR's urban storm water management in the form of the Regional Policy Letter of June, 1992. That document requires "proactive planning" and mandates that USBR "shall coordinate with local governments and irrigation districts where applicable to develop a comprehensive drainage plan..." The policy goes on to describe a permitting process that takes into consideration the thoughtful and logical consequences of urban storm water in USBR drainage facilities. The City of Caldwell has questioned the legal authority under which USBR requires permits for urban storm water runoff. Nonetheless, it has also expressed willingness to work in a cooperative approach with USBR toward "a comprehensive drainage plan" that includes review and issuance of a permit.

In reality, the entire Policy Letter is rendered moot through provisions requiring PID approval and consent. As PID's storm water management policy clarifies (Appendix D), its approach is much more simplistic: No urban storm water is allowed in USBR or PID drainage facilities under any circumstances. To argue in the EA that the transfer of drainage facilities will not affect a change in policy (See pages 11 and 17) is disingenuous. This change has substantial consequences for the vast majority of project "beneficiaries" and requires further analysis.

With respect to efficiency, it is not true that PID alone maintains the drainage facilities. The City of Caldwell has the responsibility for maintaining all drainages at road crossings and many other piped drains. The City is also involved in drainage issues with interested third parties who are almost exclusively public and private landowners in the process of developing their property. In short, because conflicts are anticipated to continue or increase with PID ownership of the drainage facilities, and because USBR has taken little or no active management role² over the facilities, the EA should reevaluate what efficiencies are to be gained from the proposed transfer.

As the EA recognizes, there are six criteria that must be considered in evaluating any proposed transfer. The City has concerns that the EA is less an objective assessment of the criteria and

¹ Caldwell is concerned with the phrasing of this statement that would suggest the drains were *not* designed to handle storm water runoff from urban areas. Since the drains have been in place for decades while the land uses around them have changed, logic would dictate that the drains must have been designed to accommodate storm water at certain flow rates without regard to the character of lands where the storm water fell. Without further clarification, the City will assume the drains were designed to handle, and are capable of handling, storm water at flow rates expected from unimproved agricultural lands.

² "PID would continue to operate and maintain the facilities as part of its integrated system in a manner consistent with its legal and fiduciary responsibilities. *The title transfer would not alter the purpose, management or use of the facilities.*" EA at 11. (Emphasis added).

more a cooperative effort with PID to express PID positions and rationale for seeking the title transfer. The City of Caldwell respectfully requests that the EA be reanalyzed and reviewed more objectively in light of the following concerns:

1. Criterion 1: The Federal Treasury And Thereby The Taxpayers' Financial Interests Must Be Protected.

The City is concerned about how the financial interests of our residents are advanced by a transfer of liabilities from the Federal Government to PID. It is clear from the EA that PID will be required to assume all liability associated with the drains. Because the vast majority of property owners assessed by PID are urban residents to whom PID would deny drainage rights, and because assessments will be PID's means of paying any liability associated with the drains, it would seem that the majority of assessment payers assume a liability with no benefit.

Ironically, the same urban residents who would help PID pay liabilities associated with the USBR drains would be required to fund construction of another storm water drainage system for their own use. Costs for right-of-way acquisition and infrastructure construction of a new system would be astronomical. Whether transfer truly works to the financial benefit of the taxpayers in the cities of Caldwell and Nampa must be more closely examined.

2. Criterion 2: There Must Be Compliance With All Federal And State Laws.

While the City has questioned whether USBR has the authority to deny urban residents the right to continue discharge of storm water into existing drains at historic levels, it is clear that PID's policy of prohibiting all urban storm water drainage violates Idaho law.

Initially, whether a property owner possesses land that is agricultural or urban in nature, the Idaho Supreme Court has recognized a right for that landowner to discharge storm water down gradient. Though the property may be modified (e.g. developed for urban use), the right exists unless the property has been altered to increase the flooding risk. See *Smith v. King Creek Grazing Ass'n.*, 105 Idaho 644 (Ct. App. 1983). As will be discussed, urban lands in Caldwell do not increase, but actually decrease, the risk of flooding when compared to unimproved agricultural lands.

Second, the vast majority of the property interests held by USBR and PID are undocumented, prescriptive easements. Certainly, the long history of use affords USBR and PID prescriptive rights. However, a prescriptive easement is limited in scope and does not prohibit the underlying property owner from making *any use* of his property as long as it does not "materially interfere" with the prescriptive easement holder's use of the easement area. The easement area is likewise restricted to only that portion of the underlying property that has been actually used historically. See *Bentel v. Bannock County*, 104 Idaho 130, 133 (1983).

Therefore, the underlying property owner has a right to use the drainage facility on his or her property for the conveyance of storm water as long as such use does not material interfere with the use of the prescriptive easement by USBR or PID. For USBR or PID to restrict a property owner from the free use of his property in the absence of any material interference with the

historic scope of USBR or PID actual prescriptive use is unlawful. See *Nampa & Meridian Irr. Dist. v. Wash. Fed. Savings*, 135 Idaho 518 (2001). If PID's expressed storm water policy to prohibit all use is implemented, it may subject PID and Caldwell property owners and residents to litigation.

Third, from its own experience, the City understands that PID makes assessments on all lands in its district for the operation of its facilities. However, these assessments do not distinguish between PID's irrigation delivery function and PID's drainage function. Therefore, urban users, including the City itself, are assessed by PID for the funds needed by PID to maintain and operate the drains. For PID to make such assessments and then deny assessment payers access to the use of the drains violates the general principle of irrigation district assessments set out at Idaho Code § 43-701 *et. seq.*

Finally, USBR and PID facilities that were obtained by documented grant likely require USBR and PID to permit current property owners the benefits of the facilities. For example, Quitcalim Deed Instrument No. 71604, recorded in the records of Canyon County, transfers property from the Frosts to the United States of America acting under the provisions of the Reclamation Act for a portion of the West End Drain. The consideration given to the Frosts in that deed includes "the benefits to be derived from the construction of irrigation works in the vicinity of the land described herein." Almost certainly, this deed is not unique and many USBR facilities proposed for transfer were acquired upon the extension of similar consideration. Surely, the "benefits to be derived" include access to USBR drainage facilities in perpetuity. Prior to any transfer of USBR facilities to an entity that has expressed its intent to prohibit urban storm water runoff in those facilities, further legal review in the EA is needed.

3. Criterion 6: The Public Aspects Of The Projects Must Be Protected.

In an urbanizing area, the public has significant interest in drainages that crisscross developed properties. While the primary interest discussed thus far is the right to discharge urban storm water, public aspects surrounding the facilities themselves and the proposed transfer include the right or ability of the City or third parties to cross these facilities with roadways and utilities and to construct recreational and transportation pathways along their lengths. Prior to any transfer, these public aspects need to be established and protected in order for any true streamlining or efficiency to be achieved.

On page 9 of the EA, the writer concludes that "[n]o environmental justice issues are associated with the proposed title transfer." Clearly, PID's storm water management policy discriminates between agricultural landowners and urban landowners. The environmental consequences for the elimination of existing drains, or the inability of current agricultural lands to continue historic drainage after development may result in significant adverse environmental impacts. There is no analysis of how the elimination of drainage rights now or in the future might create standing water, flooding, property damage, require the construction of a new storm water system and/or other issues for urban residents to deal with. In light of such discrimination, the EA should clearly analyze the degree of risk posed not only to USBR and PID, but to urban residents who will be left with serious storm water management problems given PID's express intent to prohibit urban storm water discharge.

September 14, 2007
Page 5

The EA describes three alleged problems that arise in connection with urban storm water runoff: flooding, water quality issues, and governmental regulation. By letter dated March 1, 2007, the City advised PID's attorney of a detailed analysis undertaken by the City to evaluate the distinction between storm water runoff from agricultural areas and storm water runoff from urban areas that were developed in a manner consistent with the City's Storm Water Management Policy. That analysis concluded that the impact of the City's existing storm water policy is to reduce peak discharges of storm water over what would be anticipated from an undeveloped agricultural field. While the duration of discharge is longer from an urban storm water system and more total water is drained, the critical peak volume, which is most indicative of flood risk, is *reduced* over the peak volume discharged from undeveloped farm ground. I am happy to make this data available to USBR in a reevaluation of the EA.

Certainly this data would be much more germane than the obvious but irrelevant observation on page 19 that "impervious surfaces in urban areas [result in] greater runoff than from agricultural areas." The analysis in the EA does not take into consideration the impact of the City's Storm Water Management Policy. In order to have any clear understanding of flood risk from urbanizing areas, the EA must be reevaluated in light of the City's urban construction requirements concerning storm water management. At present, there is no thoughtful or compelling reason to believe that urban land use development in Caldwell will result in increased risk of flooding.

The existing EA does not analyze water quality issues outside the context of the Clean Water Act and NPDES permit requirements. It therefore appears to analyze together concerns regarding water quality and regulation. The EA simply sets forth "PID's position" that PID may lose irrigation return flow exemptions under the Clean Water Act and be required to obtain an NPDES permit. This is contrary to EPA's position on the matter. Obviously, since EPA is the primary enforcement authority in Idaho for Clean Water Act issues, the City would like to see EPA's analysis considered in the EA along with "PID's position."

In a letter dated July 22, 2007 from James A. Hanlon, Director of the Office of Wastewater Management for the EPA, to William J. Switzer of the Ada County Highway District, the EPA opinion is expressed that commingled irrigation return flows and urban storm water runoff do not require an NPDES permit as long as the non-agricultural flows in the drain are allowed by NPDES permit. The City of Caldwell has made application for and anticipates in the near future receiving and MS4 permit from EPA authorizing its urban storm water discharges. In light of the dramatic importance of urban storm water discharge to the City of Caldwell, it respectfully requests that the EA be reevaluated and the true regulatory risk assessed more clearly.

In light of the numerous and ongoing conflicts between the City and PID, it may well be in the greatest public good to see the drainages transferred to the City of Caldwell. By the express terms of the EA, this consideration was given no detailed analysis. In light of the potential for ongoing inefficiencies and conflicts described herein, it is certainly not clear that USBR's desire to "streamline" processes will be achieved by a transfer to PID, but not to the City of Caldwell.

September 14, 2007
Page 6

A transfer to PID rather than the City does not address what the long-term disposition of the facilities might be. The EA acknowledges that virtually all of the land surrounding the facilities to be transferred will be converted to urban or suburban uses within the foreseeable future. If suburban and urban land uses cannot discharge into the facilities, and agricultural lands do not exist in proximity to the facilities, they will have little or no utility. Further, it is questionable whether a reasonable, legal assessment base for the perpetual maintenance of the drains will exist.

Certainly, the future of the subject drains will be as features in a wholly urban landscape. As such, it would seem to be the urban entity that should be given serious consideration for the transfer. Contrary to the EA's iteration of "PID's position" on page 13, the City is authorized to operate irrigation and drainage facilities. See Idaho Code § 50-332-333; 50-1801 *et seq.*

Guidelines and Conclusion

In addition to the criteria set out above, the Framework for the Transfer of Title, Bureau of Reclamation Projects, August 7, 1995 sets forth several guidelines that must be considered in connection with any proposed transfer. Of significance to the City of Caldwell are the following:

All transfers must have the consent of other project and beneficiaries. If another beneficiary raises substantive objections which cannot be resolved, the project will remain in Federal ownership.

Reclamation officials will meet with representatives from all interested Federal and State agencies to consider their concerns early in the transfer process.

The financial interests of the Government and the general taxpayers will be protected.

At this point, the City of Caldwell does not consent to the transfer of USBR facilities to PID. While the transfer makes sense in theory, there are far too many outstanding issues between the City and PID, including but not limited to urban storm water drainage, that must be resolved before the City will have any level of comfort in PID ownership of USBR facilities. We hope and believe that USBR can facilitate resolution of these issues. If such a resolution can be achieved through this current process of considering the proposed transfer, the City may yet withdraw its objection. However, clearly the majority of the "beneficiaries" of USBR facilities reside in the urbanized areas of Nampa and Caldwell. Pursuant to USBR's own framework, those concerns must be resolved or the facilities will remain in Federal ownership.

The City has little faith in the objectivity of the EA as currently drafted. It relies heavily and repeatedly on "PID's position," but misrepresents the City's. The Response List to PID Comments (Appendix C) characterizes a letter from Gordon N. Law of the City of Caldwell as "no objection." In fact, Mr. Law's letter raises no objection "as long as the transfer is made contingent on lands historically drained by said facilities retaining the right to drain at historical rates in perpetuity." Given the general lack of objectivity that characterizes the EA draft at this

September 14, 2007
Page 7

time, the City regrettably must doubt that the mischaracterization of Mr. Law's comments was inadvertent.

While there are inaccuracies and incomplete analyses fundamental to the transfer Framework, criteria and guidelines, the City is willing to work constructively with USBR, PID and other beneficiaries and interested parties to resolve its concerns and ultimately support the transfer. The City calls upon USBR to fulfill its "proactive planning" obligation to the public by negotiating and issuing storm water discharge permits, binding on PID in the event of transfer, pursuant USBR's regional policy letter.

Very truly yours,

HAMILTON, MICHAELSON & HILTY, LLP



MARK HILTY

MH/md

COC003116

EXHIBIT B

to

AFFIDAVIT OF DYLAN B. LAWRENCE

Pioneer v. City of Caldwell
Case No. CV-2008-556-C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION)
DISTRICT,)
) Case No. CV 08-556-C
Plaintiff,)

vs.)
)
CITY OF CALDWELL,)
)
Defendant.)

)
CITY OF CALDWELL,)
)
Counterclaimant,)
vs.)

)
PIONEER IRRIGATION)
DISTRICT,)
)
Counterdefendant.)

VIDEOTAPED DEPOSITION OF JEFFREY SCOTT
April 15, 2009
Boise, Idaho

Susan L. Sims, CSR No. 739

45	9/8/2003 Case Management Report	106
	COC098061-COC098066 (6 pages)	
46	11/13/2003 letter to Gordon Law from	106
	Deborah Long and attached Case Management	
	Report (9 pages)	
47	9/8/2004 letter to Gordon Law from	106
	Deborah Long and attached Case Management	
	Report (11 pages)	
48	6/25/2004 letter to Gordon Law from	106
	Deborah Long and attached Case Management	
	Report (10 pages)	
49	9/30/2005 letter to City of Caldwell from	137
	Jeff Scott EPID024912-EPID024914 (3 pages)	
50	8/22/2007 letter to Canyon County	138
	Development Services Department from	
	Jeff Scott EPID025751-EPID025754 (4 pages)	
51	4/10/2006 letter by Naida Kelleher	209
	COC002794-COC002800 (7 pages)	
52	Pioneer Irrigation District Discharge Point	231

Page 3

VIDEOTAPED DEPOSITION OF JEFFREY SCOTT

BE IT REMEMBERED that the videotaped deposition of JEFFREY SCOTT was taken by the attorney for the Defendant at the offices of Holland & Hart, located at 101 S. Capitol Blvd., Suite 1400, Boise, Idaho, before Susan L. Sims, a Court Reporter (Idaho Certified Shorthand Reporter No. 739) and Notary Public in and for the County of Ada, State of Idaho, on Wednesday, the 15th day of April, 2009, commencing at the hour of 9:11 a.m. in the above-entitled matter.

APPEARANCES:

For the Plaintiff:

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Also present: Ron Garnys, Videographer

Page 2

PROCEEDINGS

MR. STIDHAM: My name is Erik Stidham. I'm a member of the firm of Holland & Hart. I represent the City of Caldwell in the matter of Pioneer Irrigation District v. City of Caldwell, Case No. CV 08-556-C.

The deposition is being made on behalf of Defendant City of Caldwell. The deposition is being video tape-recorded by Ron Garnys, who is an associate of the John Glenn Hall Company, whose business address is Post Office Box 2683, Boise, Idaho.

Today's date is April 15th. The time is approximately 9:12. The location of the deposition is Holland & Hart Boise office. The deponent's name is Mr. Jeff Scott.

Would other counsel please identify themselves?

MR. CAMPBELL: Scott Campbell with the firm of Moffatt Thomas. I represent Pioneer Irrigation District.

MR. STIDHAM: Would you please swear the witness.

///

Page 4

1 (Pages 1 to 4)

1 developers?
2 A Yeah, they're sent. We also have them
3 on e-mail. We also have them in a file. If the
4 developer comes to our office, we can hand them
5 our specs. We can e-mail them.
6 Q Okay. And who's responsible for
7 getting the specs to the developer? Is that your
8 job? Is that Mr. Zirschky's job? Or is it
9 Mr. Mason's job?
10 A All.
11 Q All?
12 A It's all of our, yeah. He can get
13 them from any one of us.
14 Q Okay.
15 A He can just go to the office and get
16 them from the secretary.
17 Q Okay. Now, broader than just the
18 specifications, I guess my question is, and maybe
19 there's not a policy. My question is, is there a
20 policy or criteria that Pioneer looks to as to
21 whether or not to accept a proposed encroachment,
22 a policy such as determining whether or not a
23 proposed encroachment interferes with, you know,
24 Pioneer's delivery of water?
25 A Can you re- --

Page 145

1 Q Sure. I'm trying to find out -- if
2 there's no policy, that's fine. I'm just trying
3 to find out if there is a policy.
4 Does Pioneer have any policy or
5 policies as to what types of encroachment will be
6 accepted and what, you know, types of things are
7 going to be -- proposed encroachments are going
8 to be denied?
9 A I believe that would be a case-by-case
10 scenario.
11 Q Okay. And are you involved in
12 reviewing the proposals to determine whether on a
13 case-by-case basis the proposal should be denied?
14 A Yes.
15 Q What role do you play?
16 A My role would be to notify the
17 district of how much water flows through that
18 facility. How many headgates are involved.
19 Q Okay.
20 A That's about it.
21 Q Okay. And who do you provide that
22 information to? Mr. Mason?
23 A Mr. Mason.
24 Q Okay. All right. Any other input you
25 have or involvement you have in the process of

Page 146

1 determining whether a proposed encroachment
2 should be accepted or denied?
3 A No.
4 Q I believe you said that you provide --
5 when there's a proposed encroachment, you provide
6 Mr. Mason with information regarding water flows
7 through the relevant area; is that correct?
8 A That's correct.
9 Q How do you determine what the water
10 flow is through the relevant area?
11 A I determine on how many acres that
12 facility is delivering.
13 Q Okay. And is there a number that's
14 assigned when you determine how many acres it's
15 delivering, do you assign some measurement of
16 water to that per acre?
17 A Yes.
18 Q Okay. What is that measurement of
19 water per acre that you assign?
20 A One miner's inch per acre.
21 Q And one miner's inch per acre, does
22 that reflect how much water is to be delivered to
23 an acre?
24 A Yes.
25 Q And what's the time frame in which

Page 147

1 that measurement is based upon?
2 A Beneficial use.
3 Q And is there a time period to which
4 you assign beneficial use or that you correlate
5 to beneficial use?
6 MR. CAMPBELL: I'll object, calls for
7 a legal conclusion.
8 THE WITNESS: During the irrigation
9 season.
10 Q (BY MR. STIDHAM) Okay. Is there
11 any -- when you give the flow numbers to --
12 sorry. I want to make sure I'm using the right
13 term.
14 When you give Mr. Mason information
15 regarding how much flows through the relevant
16 portion, do you provide him any number or any
17 number that correlates to irrigation runoff?
18 A No.
19 Q Okay. What about stormwater
20 discharge, do you give him any calculations
21 relating to stormwater discharge per acre?
22 A No.
23 Q Why not?
24 A Because we don't accept stormwater
25 into our system.

Page 148

37 (Pages 145 to 148)

<p>1 Q You accept agricultural stormwater 2 into your system, correct? 3 A Correct. 4 Q Do you give him any numbers to 5 calculate agricultural stormwater runoff when you 6 provide these numbers to Mr. Mason for flow? 7 A No. 8 Q Why not? 9 A Because that initial one miner's inch 10 per acre delivered out of that facility is what 11 they're entitled to. 12 Q Okay. So just so I'm clear, is there 13 any effort to calculate flow for Mr. Mason's 14 purposes that incorporates within it any capacity 15 or water discharges related to agricultural 16 stormwater? 17 MR. CAMPBELL: I'll object. It's a 18 compound question. 19 THE WITNESS: No, not to my knowledge. 20 Q (BY MR. STIDHAM) Okay. And if I 21 understood you correctly, there's also no 22 component of the figures that are given to 23 Mr. Mason that correlates to irrigation return 24 flows, correct? 25 A Correct.</p> <p style="text-align: right;">Page 149</p>	<p>1 flows are typically going into the drains. 2 Q (BY MR. STIDHAM) Okay. Any other 3 reasons why, other than the one you've just 4 articulated, why you don't give or don't 5 incorporate into the numbers you give to 6 Mr. Mason irrigation return flows and then urban 7 and agricultural stormwater discharges? 8 A Can you rephrase that? 9 Q Sure. Any other reasons besides the 10 one you just articulated as to why you don't 11 include urban or stormwater -- agricultural 12 stormwater or irrigation return flows into those 13 numbers you give Mr. Mason? 14 A I don't know. 15 Q When you give Mr. Mason numbers 16 related to the analysis he's got to do for a 17 proposed encroachment, do you go look at the 18 facility in question to see whether there are 19 discharge points into that section? 20 MR. CAMPBELL: Objection, ambiguous. 21 THE WITNESS: I don't. 22 Q (BY MR. STIDHAM) Why not? 23 MR. CAMPBELL: Same objection. 24 A I don't know. 25 Q (BY MR. STIDHAM) Do you know whether</p> <p style="text-align: right;">Page 151</p>
<p>1 Q But it's true, you understand that 2 Pioneer does accept irrigation return flows, 3 correct? 4 A Yes. 5 Q And in fact, there is stormwater 6 discharge both urban and agricultural that in 7 fact enters into Pioneer's facilities, correct? 8 A Correct. 9 Q So given the reality of the fact that 10 Pioneer's facilities accept irrigation return 11 flow, what Pioneer calls agricultural stormwater, 12 and what Pioneer calls urban stormwater, why is 13 it that those are not factored into the numbers 14 that are provided to Mr. Mason for his 15 calculations? 16 MR. CAMPBELL: Object to the question. 17 It's ambiguous and potentially calls for a legal 18 conclusion. If you can answer the question, go 19 ahead. 20 THE WITNESS: Typically those 21 agricultural return flows are going into drain 22 ditches. And our supply ditches are on the high 23 side of ground. Therefore, those ag return flows 24 are verily, verily seldom discharging into the 25 supply side of our system. So those ag return</p> <p style="text-align: right;">Page 150</p>	<p>1 Mr. Mason, when he's doing his calculations 2 regarding a proposed encroachment, whether he 3 takes any steps to determine whether there are 4 discharge points in the facilities that are at 5 issue? 6 A I believe so. 7 Q So is it fair to say that you rely 8 upon Mr. Mason to do the analysis as to whether 9 there are existing discharge points into the 10 portion of the facility that's being encroached 11 upon? 12 A Yes. 13 Q Now, with regard to encroachment upon 14 drains, is anything handled differently from the 15 work you do, if it's a proposed encroachment for 16 a drain versus a canal that's used for delivering 17 water? 18 A Yes. 19 Q What's different? 20 A The facility. 21 Q Okay. What's different about the work 22 you do or the information you provide to 23 Mr. Mason? 24 A It depends on what facility. 25 Q Okay. Can you tell me why it depends?</p> <p style="text-align: right;">Page 152</p>

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,)
Plaintiff,) Case No. CV 08-556-C
v.)
CITY OF CALDWELL,)
Defendant.)

CITY OF CALDWELL,)
Counterclaimant,)
v.)
PIONEER IRRIGATION DISTRICT,)
Counterdefendant.)

VIDEOTAPED DEPOSITION OF JEFF SCOTT
VOLUME II (PAGES 236 - 446)

April 27, 2009

Boise, Idaho

Amy E. Simmons, CSR No. 685, RPR, CRR

APPEARANCES (continued):

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Also Present: John Glenn Hall, Videographer

238

SCOTT, 4/27/09

VIDEOTAPED DEPOSITION OF JEFF SCOTT

BE IT REMEMBERED that the deposition of JEFF SCOTT was taken by the attorney for the Defendant at the law offices of Holland & Hart, located at 101 S. Capitol Boulevard, Suite 1400, Boise, Idaho, before Amy E. Simmons, a Court Reporter (Idaho Certified Shorthand Reporter No. 685) and Notary Public in and for the County of Ada, State of Idaho, on Monday, the 27th day of April, 2009, commencing at the hour of 9:21 a.m. in the above-entitled matter.

APPEARANCES:

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237 SCOTT, 4/27/09

INDEX
EXAMINATION

JEFF SCOTT PAGE

By: Mr. Stidham

EXHIBITS

NO.	PAGE
53. Set of Color Maps, Bates Nos. PID072193 through PID072457 (265 pages)	254
54. Color Full-Size Map Copy, Bates No. PID 072367 (1 page)	264
55. Meeting Minutes Dated January 7, 2004, Bates Nos. PID068658 and PID068659 (2 pages)	367
56. Excerpt from June 24, 2004, Minutes, Bates Nos. PID068681 through PID068684 (4 pages)	391
57. Excerpt from November 8, 2004, Minutes, Bates Nos. PID068700 through PID068702 (3 pages)	402
58. Excerpt from December 8, 2004, Minutes, Bates Nos. PID068702 through PID068705 (4 pages)	405
59. Meeting Minutes Dated February 7, 2005, Bates Nos. PID068706 through PID068709 (4 pages)	408
60. Minutes of Special Meeting Dated October 4, 2005, Bates Nos. PID068965 and PID068966 (2 pages)	414

239

SCOTT, 4/27/09

Page 242

1 (Pages 239 to 242)

1 A. Can you ask that again?
 2 Q. Sure.
 3 To the best of your knowledge, at some point
 4 did you or someone else on behalf of Pioneer inform the
 5 City that Pioneer was not going to approve any
 6 construction projects or any projects that called for the
 7 discharge of what you referred to as urban stormwater
 8 into Pioneer's facilities?
 9 A. Yes.
 10 Q. When was that?
 11 A. I'm guessing three, four years ago.
 12 Q. Okay. At some point do you have a recollection
 13 of whether you or someone else on behalf of Pioneer
 14 informed the City of Caldwell that Pioneer did not want
 15 to be notified of any projects which were going to result
 16 in the discharge of stormwater into Pioneer's facilities?
 17 A. Can you rephrase that?
 18 Q. Sure.
 19 At some point, did you or someone else on
 20 behalf of Pioneer inform the City of Caldwell that
 21 Pioneer did not want to be notified of any projects that
 22 were going to result in the discharge of stormwater into
 23 Pioneer's facilities?
 24 A. Not that I recall.
 25 Q. Do you have any recollection of any discussions

Page 420

1 with anyone at the City regarding what the historical
 2 drainage rights were for any properties within the
 3 Pioneer district, as far as drainage rights into
 4 Pioneer's facilities?
 5 MR. CAMPBELL: Objection; ambiguous.
 6 THE WITNESS: Yes.
 7 Q. (BY MR. STIDHAM) What discussions do you
 8 recall?
 9 A. Patrons are entitled to one miner's inch per
 10 acre. Therefore, they're allowed to discharge one
 11 miner's inch per acre.
 12 Q. Okay. Who did you express that to at the City?
 13 MR. CAMPBELL: Objection. I think that
 14 mischaracterizes his testimony.
 15 THE WITNESS: I don't recall.
 16 Q. (BY MR. STIDHAM) Do you recall when?
 17 A. Ever since I've been superintendent.
 18 Q. So there have been numerous times you've had
 19 that discussion?
 20 A. Yes.
 21 Q. Do you recall having that discussion with
 22 Mr. Law?
 23 A. Yes.
 24 Q. Okay. How many times have you had that
 25 discussion with Mr. Law?

Page 421

1 A. I would -- at least a couple.
 2 MR. CAMPBELL: Excuse me, Erik. It's a housekeeping
 3 measure.
 4 MR. STIDHAM: Sure.
 5 MR. CAMPBELL: Do you think you're going to finish
 6 today?
 7 MR. STIDHAM: I think if you can indulge me for
 8 another 30 minutes, I think we could, Scott.
 9 MR. CAMPBELL: Okay.
 10 MR. STIDHAM: With the only caveat being -- and I
 11 generally hope it doesn't -- the only caveat being
 12 depending on kind of how things shake out with regard to
 13 stipulation and the motions that are pending. I have
 14 purposely stayed away from asking some questions
 15 regarding some of the topics that we're at least hoping
 16 are going to be taken out of this case with regard to
 17 attorneys' fees and --
 18 MR. CAMPBELL: Sure. Well, I can tell you right now
 19 we'll be filing -- if the machinery works, we'll be
 20 filing a non-opposition to the motion to amend.
 21 MR. STIDHAM: Okay.
 22 MR. CAMPBELL: Today. If that clarifies things.
 23 MR. STIDHAM: Good. It will. So if Amy and John
 24 can go for another 30 minutes, I think we can end up at a
 25 nice stopping point. But for reservations related to

Page 422

1 additional discovery of documents and depending on how a
 2 couple motions shake out, I would think we'd be able to
 3 end it.
 4 MR. CAMPBELL: Okay. Let's try then. Because Jeff
 5 has to run a system.
 6 MR. STIDHAM: Yep.
 7 Q. (BY MR. STIDHAM) Do you want to take a quick
 8 break or do you want to go for another 30 minutes?
 9 A. Let's get her done.
 10 Q. Let me just look real quickly, Mr. Scott, where
 11 we were at.
 12 Oh, I'm sorry, going back to the conversations
 13 you had with Mr. Law, do you recall what the context was
 14 for those discussions?
 15 A. Other than discharging one miner's inch per
 16 acre, no.
 17 Q. Okay. Were you ever involved in any -- and I'm
 18 asking about you personally -- been involved in
 19 communications with the City regarding requests on behalf
 20 of Pioneer for changes to the City's stormwater manual?
 21 A. Have I requested?
 22 Q. Have you been involved, either done so directly
 23 yourself or been involved in any communications on behalf
 24 of Pioneer to the City of Caldwell requesting changes to
 25 the City's stormwater manual?

Page 423

EXHIBIT C

to

AFFIDAVIT OF DYLAN B. LAWRENCE

Pioneer v. City of Caldwell
Case No. CV-2008-556-C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,)
)
 Plaintiff,) Case No. CV 08-556-C
)
 v.)
)
 CITY OF CALDWELL,)
)
 Defendant.)
 _____)
 CITY OF CALDWELL,)
)
 Counterclaimant,)
)
 v.)
)
 PIONEER IRRIGATION DISTRICT,)
)
 Counterdefendant.)
)

VIDEOTAPED DEPOSITION OF ALAN NEWBILL

June 23, 2009

Boise, Idaho

Amy E. Simmons, CSR No. 685, RPR, CRR

INDEX EXAMINATION

ALAN NEWBILL	PAGE
--------------	------

By: Mr. Stidham 5

EXHIBITS

NO.	PAGE
66. Idaho Statesman Article Entitled "Dumping Urban Runoff Into Irrigation Canals Poses Health, Flood Risk" (1 page)	112
67. Pioneer Irrigation District Summit on Rural & Urban Water Delivery Challenges, October 8, 2008 (22 pages)	127
68. Pioneer Irrigation District Season Schedule and Rates (2 pages)	141
69. Meeting Excerpts, Bates Nos. COC195325 through 195333 (9 pages)	145
70. Idaho Statesman Article Entitled "Irrigation District Sues Caldwell" (1 page)	155
71. Meeting Minutes Dated 3/8/06, Bates Nos. PID068992 through 068997 (6 pages)	157

NEWBILL, 6/23/09

Page 3

VIDEOTAPED DEPOSITION OF ALAN NEWBILL

BE IT REMEMBERED that the videotaped deposition of ALAN NEWBILL was taken by the attorney for the Defendant at the law offices of Holland & Hart, located at 101 S. Capitol Boulevard, Suite 1400, Boise, Idaho, before Amy E. Simmons, a Court Reporter (Idaho Certified Shorthand Reporter No. 685) and Notary Public in and for the County of Ada, State of Idaho, on Tuesday, the 23rd day of June, 2009, commencing at the hour of 9:13 a.m. in the above-entitled matter.

APPEARANCES:

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Also Present: John Glenn Hall, Videographer

NEWBILL, 6/23/09

Page 2

PROCEEDINGS

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

THE VIDEOGRAPHER: This is the beginning of Tape No. 1. On the record.

MR. STIDHAM: My name is Erik Stidham. I'm a member of the law firm of Holland & Hart. I represent the City of Caldwell in the matter of Pioneer Irrigation District v. City of Caldwell, Case No. CV 08556-C.

The deposition is being made on behalf of the defendant, City of Caldwell. The deposition is being videotape recorded by John G. Hall, who is the proprietor of the John Glenn Hall Company, whose business address is post office box 2683, Boise, Idaho.

Today's date is June 23rd. The time is approximately 9:15. The location of the deposition is Holland & Hart's Boise office. The deponent's name is Mr. Alan Newbill.

Would other counsel please identify themselves for the record.

MR. WILLIAMS: Brad Williams, Moffatt Thomas, for Pioneer.

MR. CAMPBELL: Scott Campbell, Moffatt Thomas, for Pioneer.

MR. STIDHAM: Would you please swear the witness.

///

Page 4

1 within Nampa-Meridian when it's not feasible for the
 2 different entities. That would be a private -- that
 3 wouldn't be an irrigation district issue. It would be a
 4 private landowner issue.
 5 Q. Going back to the agreements that Pioneer has
 6 with the Franklin Irrigation District and the Mason Creek
 7 Irrigation District, can you describe for me how those
 8 agreements work or what the purpose of those agreements
 9 are in general? Just in general.

10 A. Okay. There is the Highline Canal. Franklin
 11 Irrigation District dug the early portion of Highline
 12 Canal. And then Caldwell Highline came along and
 13 increased to modify on their original canal and expanded
 14 it to more lands. And then Franklin, in return for using
 15 their easement for -- they granted Franklin Irrigation
 16 District free water for the life of the project.

17 I assume it's the same with Mason Creek. Those
 18 documents are missing. And we've worked extensively with
 19 them to try to revise them.

20 Q. Do those arrangements with those two irrigation
 21 districts work fine? Any problems?

22 A. There are problems.

23 Q. What are the problems?

24 A. I don't know. Seems like we have conflicts all
 25 the time over one issue or another.

Page 173

1 build on its property?
 2 A. To build on whose property?
 3 Q. On the patron's property.
 4 A. As in -- be more specific.
 5 Q. Build a residence on the patron's property?
 6 A. Okay. Somebody builds a residence on their
 7 property?

8 Q. Yes.

9 A. And Pioneer denied them drainage rights?

10 Q. Yes. Does Pioneer do that?

11 A. No.

12 Q. What about if you were to build a subdivision,
 13 a residential subdivision on your property right now?

14 A. My own personal property?

15 Q. Yeah. Let's say on your father's property.

16 A. Okay.

17 Q. If you were to build a subdivision on that
 18 property, would Pioneer deny you the rights as a property
 19 owner of draining from that property?

20 A. Urban stormwater?

21 Q. Well, draining from the property.

22 A. Absolutely.

23 Q. Why?

24 A. It's against district policy.

25 Q. Okay. What if -- well, what if it's at the

Page 175

1 Q. And how are those -- what types of conflicts?
 2 Legal disputes?

3 A. It hasn't ever gotten to a legal dispute yet,
 4 but maintenance issues, I suppose, is probably the
 5 biggest conflict. They think that we should be doing
 6 more than what we're doing in some cases, in water right
 7 issues. That's when it really came to head, was over in
 8 this Snake River Basin Adjudication stuff.

9 Q. Okay.

10 A. There was some water right issues that we
 11 claimed the same water rights as what they did.

12 Q. Okay. Does Pioneer serve any drainage function
 13 for its patrons?

14 A. That's part of what we do.

15 Q. Can you describe those drainage functions that
 16 Pioneer serves for its patrons?

17 A. Every parcel of land that we deliver water to
 18 we supply drainage to.

19 Q. And moneys are assessed for that, correct?

20 A. It's all one lump thing. There are no moneys
 21 that are exchanged specifically for drainage. The same
 22 breaker charge covers the whole thing.

23 Q. Is there any reason why Pioneer would stop
 24 providing -- serving a drainage function for one of its
 25 patrons simply because one of the patrons decides to

Page 174

1 same -- your father's property has drainage rights,
 2 right?

3 A. Sure, for agricultural drainage.

4 Q. Okay. If you were to build a subdivision on
 5 your father's property and drain at the same rate, same
 6 volume, would Pioneer deny you the right to drain on that
 7 property?

8 A. Yes.

9 Q. Do you think that's fair?

10 A. Yes.

11 Q. Why?

12 A. Because it's different.

13 Q. Okay. Just based --

14 A. It's not the same stuff.

15 Q. Just based on what your attorney has told you
 16 about the clean water exemption?

17 A. On what we have discussed this whole meeting.

18 Q. Okay. That's fair enough.

19 When did Pioneer first start refusing to accept
 20 what you refer to as urban stormwater discharge?

21 A. I don't know the date of that. I was started
 22 on the board in 2002, and it was in place then. I don't
 23 go beyond that. I don't know.

24 Q. Had you ever seen it in writing prior to 2006?

25 A. I can't tell you that. I don't know.

Page 176

44 (Pages 173 to 176)

1 Q. Okay. Going back to the example we talked
2 about if you were to build a subdivision on your father's
3 property, is it your understanding that you'd be able to
4 discharge irrigation return flows from that developed
5 property into Pioneer's system?
6 A. Irrigation return flows off of?
7 Q. Off of the subdivision, the developed property.
8 A. I don't know of any return flows, irrigation
9 return flows off from a subdivision property.
10 Q. Well, if --
11 A. If it's strictly agricultural irrigation,
12 absolutely.
13 Q. Okay. I'm talking about a subdivision that's
14 been built on land that was formerly used for
15 agricultural purposes.
16 A. Okay.
17 Q. The individuals within that subdivision watered
18 their lawns using irrigation from Pioneer. If they over
19 watered their lawn and that water then travels back into
20 Pioneer, does Pioneer have any objection to that?
21 A. If it's just used for irrigation, no.
22 Q. Why is it that Pioneer objects to water that
23 falls from the sky in a storm, lands on residential
24 property, and then travels into Pioneer's system --
25 A. Because it's run down the --

Page 177

1 Q. Just to finish --
2 A. Okay.
3 Q. -- versus a situation in which in that same
4 residence, the water comes from the irrigation, from
5 sprinkler irrigation or some other form of irrigation,
6 and then travels back down into Pioneer's facility?
7 A. Two completely separate things.
8 Q. And what is the distinction? Why are they
9 different situations, one in which Pioneer would accept
10 the overwatering from irrigation in a residence versus
11 the other situation that Pioneer would not accept, as I
12 understand it, which is if there is a storm event?
13 A. Where it comes from, one of them is coming off
14 of rooftops and oiled roads and sidewalks and driveways,
15 and one is coming from grass or gardens.
16 Q. Okay. Any other reason why you believe that
17 this irrigation return flow within an urbanized
18 subdivision is acceptable where stormwater in that same
19 subdivision is not acceptable? Any other reasons?
20 A. Same thing we talked about, E. coli and oil and
21 all those contaminants that are found in stormwater that
22 are not quite so prevalent in irrigation return flows.
23 MR. STIDHAM: I don't think I have any more
24 questions, Mr. Newbill. I certainly appreciate your
25 patience.

Page 178

1 THE WITNESS: Certainly.
2 THE VIDEOGRAPHER: Questions?
3 MR. WILLIAMS: No.
4 THE VIDEOGRAPHER: This concludes the deposition.
5 This is the end of Tape No. 3. Off the record.

(Whereupon the deposition was concluded at 2:38 p.m.)

(Signature requested.)

Page 179

VERIFICATION

1
2 STATE OF _____)
3) SS.
4 COUNTY OF _____)

5 I, ALAN NEWBILL, being first duly sworn on my oath,
6 depose and say:

7 That I am the witness named in the foregoing
8 deposition taken the 23rd day of June, 2009, consisting
9 of pages numbered 1 to 179, inclusive; that I have read
10 the said deposition and know the contents thereof; that
11 the questions contained therein were propounded to me;
12 the answers to said questions were given by me, and that
13 the answers as contained therein (or as corrected by me
14 therein) are true and correct.

15 Corrections Made: Yes ___ No ___
16
17

ALAN NEWBILL

18
19
20 Subscribed and sworn to before me this ___ day of
21 _____, 2009, at _____, Idaho.
22
23

Notary Public for Idaho

Residing _____, Idaho

My commission expires: _____

Page 180

45 (Pages 177 to 180)

EXHIBIT D

to

AFFIDAVIT OF DYLAN B. LAWRENCE

Pioneer v. City of Caldwell
Case No. CV-2008-556-C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION)
DISTRICT,)
Plaintiff,)
Case No. CV 08-556-C

vs.)
CITY OF CALDWELL,)
Defendant.)

CITY OF CALDWELL,)
Counterclaimant,)
vs.)

PIONEER IRRIGATION)
DISTRICT,)
Counterdefendant.)

VIDEOTAPED DEPOSITION OF LELAND EARNEST
June 24, 2009
Boise, Idaho

Susan L. Sims, CSR No. 739

For the Defendant:

HOLLAND & HART, LLP
By: Erik F. Stidham, Esq.
101 S. Capitol Blvd., Suite 1400
Boise, ID 83701
Telephone: (208)342-5000
Facsimile: (208)343-8869
efstidham@hollandhart.com

Also present: John G. Hall, Videographer

Page 3

VIDEOTAPED DEPOSITION OF LELAND EARNEST

BE IT REMEMBERED that the videotaped deposition of LELAND EARNEST was taken by the attorney for the Defendant at the offices of Holland & Hart, located at 101 S. Capitol Blvd., Suite 1400, Boise, Idaho, before Susan L. Sims, a Court Reporter (Idaho Certified Shorthand Reporter No. 739) and Notary Public in and for the County of Ada, State of Idaho, on Tuesday, the 24th day of June, 2009, commencing at the hour of 10:06 a.m. in the above-entitled matter.

APPEARANCES:

For the Plaintiff:

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHTD.

By: Bradley J. Williams, Esq.

420 Memorial Drive

Idaho Falls, ID 83405

(208) 522-6700

(208) 522-5111

bjw@moffatt.com

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHTD.

By: Scott L. Campbell, Esq.

101 S. Capitol Blvd., 10th Floor

Boise, ID 83701

Telephone: (208)345-2000

Facsimile: (208)385-5384

slc@moffatt.com

Page 2

INDEX

EXAMINATION

LELAND EARNEST	PAGE
By: Mr. Stidham	6

EXHIBITS

NO.	PAGE
72. April 30, 2007 letter to Pioneer Irrigation District Board of Directors from Scott L. Campbell PID090749 (1 page)	83
73. October 1, 2008 Pioneer Irrigation District Fall Assessment to Leland C. Earnest PID072908 (1 page)	100

Page 4

1 (Pages 1 to 4)

1 separate account -- well, I know they're not in a
2 separate account. But if they're probably --
3 they might be tracked separately, but I can't
4 tell you for sure.

5 Q Do you know whether the monies are
6 used differently? For example, are the monies
7 collected related to assessment expenses and the
8 monies collected pursuant to operation and
9 maintenance, are they used differently?

10 A To my knowledge, they're not. They're
11 all used in the budget.

12 Q Is Pioneer Irrigation District, is it
13 a drainage district?

14 A No, sir.

15 Q And does it perform drainage
16 functions?

17 A We maintain drain ditches for the
18 bureau. And we have several that we own, I
19 guess.

20 Q Does Pioneer expend money to maintain
21 and operate drains?

22 A Yes, sir.

23 Q Okay. And where does the money that
24 is used to operate and maintain drains, where
25 does that come from?

Page 93

1 A Out of the budget.

2 Q Is there a separate account or somehow
3 segregated monies that are used to perform the
4 drainage functions?

5 A Not to my knowledge.

6 Q Excuse me, to fund the drainage
7 functions is what I meant to say.

8 A Not to my knowledge.

9 Q So is it fair to say that patrons
10 within the city of Caldwell who are paying money
11 to Pioneer, some of that money paid by them is
12 used to maintain and operate drains, correct?

13 A Yes.

14 Q Okay. So in other words, if you're
15 somebody, a patron of Pioneer living in a
16 subdivision, you're paying money to fund and
17 maintain drainage functions performed by Pioneer,
18 but Pioneer is going to contend that stormwater
19 from your property can't go back into their
20 system; is that correct?

21 MR. WILLIAMS: Object to the form of
22 the question.

23 THE WITNESS: Restate the question,
24 please.

25 Q (BY MR. STIDHAM) Sure. So if I

Page 94

1 understand your testimony so far, if you're a
2 patron of Pioneer who's living, you know, in a
3 residential subdivision, you're paying money to
4 fund the maintenance and operation of Pioneer's
5 drainage functions. But at the same time,
6 Pioneer is contending that stormwater from your
7 property can't go back into Pioneer's system; is
8 that correct?

9 MR. WILLIAMS: Object to form. You
10 can answer if you understand the question.

11 THE WITNESS: Well, we don't accept
12 urban stormwater, but I guess that -- and the
13 drains were built originally to drain land, which
14 they still are doing at this time, even in the
15 city, because there's -- any time you irrigate,
16 there's water table will come up in the summer.
17 And so they're getting the benefit of the drain
18 ditches.

19 If there was not drain ditches
20 throughout the whole city, they would -- their
21 basements would be full and so on. So Pioneer is
22 not accepting urban stormwater, I guess.

23 Q (BY MR. STIDHAM) Sir, but my question
24 was a little bit different. I mean, I'll let you
25 explain why you think it's fair or something

Page 95

1 along those lines.

2 But my question was, I just want to
3 confirm that this is the situation that exists.
4 Isn't it true that if you're a patron of Pioneer
5 living within Caldwell, you live in a
6 subdivision, you're paying money to Pioneer to
7 fund Pioneer's drainage functions. And at the
8 same time, Pioneer is telling you that it's not
9 going to accept stormwater from your property
10 into Pioneer's system; is that correct?

11 A Yes, I guess.

12 Q Okay. And my follow-up question is,
13 do you think that that's fair to the patron who's
14 living in the subdivision?

15 MR. WILLIAMS: Objection, asked and
16 answered already.

17 Q (BY MR. STIDHAM) I didn't ask it, but
18 I think you inadvertently answered it. So if you
19 want to go back over it, that's fine. I was
20 actually trying to give you an opportunity to
21 explain if you think that's fair. So that's my
22 question, sir.

23 A The question is what is fair?

24 Q Yeah. Remember we talked -- you
25 agreed that that's the situation that faces a

Page 96

24 (Pages 93 to 96)

F I L E D
A.M. 2:54 P.M.

SEP 03 2009

**CANYON COUNTY CLERK
K CANNON, DEPUTY**

Scott L. Campbell, ISB No. 2251
Bradley J Williams, ISB No. 4019
Tara Martens, ISB No. 5773
Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
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18946.0059

Attorneys for Plaintiff / Counterdefendant
Pioneer Irrigation District

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

Case No. CV 08-556-C

AFFIDAVIT OF DAWN C. FOWLER

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

STATE OF IDAHO)
) ss.
County of Canyon)

DAWN C. FOWLER, having been duly sworn upon oath, deposes and states as follows:

1. I am the current Secretary/Treasurer of the Pioneer Irrigation District. As such, I am responsible for maintaining, and have access to, Pioneer's documents, files, and business records. I make this affidavit based upon my own personal knowledge.

2. Attached hereto as Exhibit A is a certified copy of Instrument No. 200414748, records of Canyon County, Idaho, entitled "Combined License and Construction, Operation, and Maintenance Agreement for Montecito Park Subdivision" and dated March 15, 2004, which I obtained from the Canyon County Recorder's Office on August 31, 2009. On or about July 25, 2008, a copy of this document was produced to the City of Caldwell in response to the City's first set of discovery requests, and identified as Bates Nos. PID015886 - PID015922.

3. Attached hereto as Exhibit B is a true and correct copy of a "Right-of-Way Agreement," executed by G.C. Muller and Katherine Muller in favor of Pioneer and notarized on December 11, 1936.

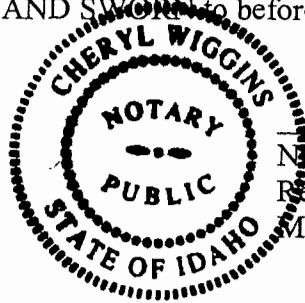
4. On or about January 8, 2009, a copy of the document attached hereto as Exhibit B was produced to the City of Caldwell in response to the City's first set of discovery requests, and identified as Bates Nos. PID048301 - PID048304. Prior and subsequent to such production, the original of that document was/is located in a file labeled, "Easements (Rights-of-way) 1924 to 1965," which Pioneer maintains in its fireproof vault at its offices located at 3804 Lake Avenue, Caldwell, Idaho.

Further your affiant sayeth naught.

Dawn C. Fowler

Dawn C. Fowler

SUBSCRIBED AND SWORN to before me this 2nd day of September, 2009.



Cheryl Wiggins

NOTARY PUBLIC FOR IDAHO

Residing at Homedale

My Commission Expires 01/29/2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF DAWN C. FOWLER** to be served by the method indicated below, and addressed to the following:

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
1301 12th Avenue
P.O. Box 65
Nampa, ID 83653-0065
Fax: 467-3058

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

J. Fredrick Mack
Erik F. Stidham
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, ID 83701-2527
Fax: 343-8869

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Dylan B. Lawrence

Dylan B. Lawrence

EXHIBIT A
TO AFFIDAVIT OF DAWN C. FOWLER

200414748

RECORDED

2004 MAR 19 PM 12 20

G NOEL HALES

CANYON CNTY RECORDER

R. McLaughlin ap.

REQUEST

TYPE ~~PRINT~~ FEEL 11-00

B+x

RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:

Moffatt, Thomas, Barrett, Rock &
Fields, Chartered
101 S. Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701-0829

(Space Above For Recorder's Use)

**COMBINED LICENSE AND CONSTRUCTION, OPERATION,
AND MAINTENANCE AGREEMENT FOR
MONTECITO PARK SUBDIVISION**

This Combined License and Construction, Operation, and Maintenance Agreement for Montecito Park Subdivision ("Agreement") is entered into and made effective this 5th day of March, 2004, by PIONEER IRRIGATION DISTRICT, an irrigation district organized and existing under and by virtue of the laws of the State of Idaho, whose address is P.O. Box 426, Caldwell, Idaho 83606; MONTECITO PARK DEVELOPMENT, LLC, an Idaho limited liability company, whose address is 701 S. Allen Street, Suite 103, Meridian, Idaho 83642; and MONTECITO PARK NEIGHBORHOOD ASSOCIATION, INC., an Idaho corporation, whose address is 701 S. Allen Street, Suite 103, Meridian, Idaho 83642.

DEFINITIONS:

In addition to the other capitalized terms defined herein, this Agreement contains certain words which shall have the following meanings:

- (a) "Developer" refers to Montecito Park Development, LLC, and any other person or entity with any legal interest in Montecito Park Subdivision.
- (b) "Association" refers to the Montecito Park Neighborhood Association, Inc., and any other person or entity with any legal interest in Montecito Park Subdivision.

- (c) "Pioneer" refers to Pioneer Irrigation District, an irrigation district organized and existing under and by virtue of the laws of the State of Idaho.
- (d) "Montecito Park Subdivision" and/or "Property" refers to the real property described in Exhibit A-Vicinity Map, attached hereto and made a part hereof.
- (e) "Crossing Plans" refers to drawings or diagrams graphically showing the water line crossings of the relocated "A" Drain, which drawings or diagrams are listed in Exhibit B, attached hereto and made a part hereof by this reference.
- (f) "Pressurized Irrigation System Plans" refers to drawings or diagrams graphically showing the Pressurized Irrigation System, which drawings or diagrams are listed in Exhibit C, attached hereto and made a part hereof by this reference.
- (g) "Tiling and Relocation Plans" refers to the drawings or diagrams graphically showing the tiling and relocation of the "A" Drain, which drawings or diagrams are listed in Exhibit D, attached hereto and made a part hereof by this reference.
- (h) "Pressurized Irrigation System" refers to the water distribution system and appurtenances for the Montecito Park Subdivision all as further listed in the Pressurized Irrigation System Plans and Specifications described in Exhibit C. The Pressurized Irrigation System specifically includes all appurtenances, pumps, pumphouses, and related facilities, including electrical power serving the system, a mainline, connecting lateral pipelines, valves, service boxes, individual lot delivery lines and facilities, and all related equipment, parts, and materials. Any reference to "personal property" in the Bill of Sale attached to this Agreement as Exhibit H and as more particularly referenced in Section 9 of Subpart B of this Agreement, shall include the Pressurized Irrigation System as defined in this paragraph (h).
- (i) "Specifications" refers to Pioneer's standard engineering drawings on file with Pioneer, and the statements describing the materials, dimensions, and workmanship for the Pressurized Irrigation System to which reference is made in Exhibit C.
- (j) "Utility" or "Utilities" refers to those services provided to the development by private or public entities, including, but not limited to, telephone, cable, electric, water, sewer, and gas, etc.

WITNESSETH:

WHEREAS, Pioneer owns and maintains a system of canals, laterals and drains, including the "A" Drain, for purposes of delivering and removing irrigation water to and from its landowners, together with easements to convey water in such canals, laterals, drains; easements for ingress and egress; and for the operation, inspection, maintenance, and repair of the canals, laterals, and drains;

WHEREAS, Developer owns that certain real property, situated in the city of Caldwell, Canyon County, Idaho, commonly known as Montecito Park Subdivision, which property is situated in the East 1/2 of Section 23, Township 4 North, Range 3 West, Boise Meridian, Caldwell, Canyon County, Idaho, as depicted in Exhibit A;

WHEREAS, Developer has subdivided the Property as Montecito Park Subdivision;

WHEREAS, the Property is located within the boundaries of Pioneer Irrigation District;

WHEREAS, Developer desires to obtain written confirmation from Pioneer approving the relocation of a portion of the existing "A" Drain and partial tiling of the relocated "A" Drain. The relocation and partial tiling of the "A" Drain will be completed as specified in the Tiling and Relocation Plans listed in Exhibit D;

WHEREAS, Pioneer desires to confirm in writing its approval of the relocation and partial tiling of the "A" Drain;

WHEREAS, Developer desires to have Pioneer abandon a portion of the existing one hundred foot (100') easement along the existing "A" Drain, lying within the East 1/2, Section 23, Township 4 North, Range 3 W, Boise-Meridian, Caldwell, Canyon County, Idaho, as more particularly described in Exhibit E, attached hereto and made a part hereof;

WHEREAS, Pioneer desires to accommodate Developer's development plans by abandoning a portion of the existing "A" Drain easement;

WHEREAS, Pioneer desires to obtain an irrigation easement and right-of-way across the property of Developer as set forth in Exhibit F, attached hereto and made a part hereof, for the purposes of conveying water in the relocated "A" Drain and for ingress and egress in order to operate, maintain, and repair the relocated "A" Drain;

WHEREAS, Developer desires to grant said irrigation easement and right-of-way as set forth in Exhibit F, for the purposes of conveying water in the relocated "A" Drain and for ingress and egress in order to operate, maintain, and repair the relocated "A" Drain;

WHEREAS, Developer desires to obtain a license from Pioneer in order to construct, operate, repair, and maintain the twelve inch (12") water lines and twelve inch (12") sewer lines crossing the relocated "A" Drain at various locations more particularly depicted in the Crossing Plans listed in Exhibit B;

WHEREAS, Pioneer desires to grant the license to Developer in order to construct, operate, repair and maintain the twelve inch (12") water lines and twelve inch (12") sewer lines crossing the relocated "A" Drain at various locations more particularly depicted in the Crossing Plans listed in Exhibit B;

WHEREAS, Developer desires to provide the Property, as subdivided, and the lots in Montecito Park Subdivision with a Pressurized Irrigation System, which Pressurized Irrigation System shall be owned, operated, and maintained by Pioneer;

WHEREAS, Developer desires to have Pioneer deliver water to and through such Pressurized Irrigation System to the Property, as subdivided, and to the lots in the Montecito Park Subdivision;

WHEREAS, Pioneer desires to own, operate, and maintain such Pressurized Irrigation System, and Pioneer desires to deliver water to and through such Pressurized Irrigation System for the benefit and best interests of the Property, as subdivided, Montecito Park Subdivision, and Pioneer;

NOW, THEREFORE, in consideration of the promises and the mutual benefits, representations, covenants, undertakings, and agreements hereinafter contained and for good and valuable consideration received by the parties, which consideration and the sufficiency thereof is hereby acknowledged by the parties hereto, Pioneer and Developer represent, covenant, undertake, and agree as follows:

Subpart A. Tiling, Relocation, and Crossing of the "A" Drain

1. Grant of Licenses. Pioneer hereby provides written confirmation to Developer of its approval of relocating a portion of the "A" Drain and tiling the relocated "A" Drain as described and depicted in the Tiling and Relocation Plans listed on Exhibit D. Developer and Pioneer expressly agree that Pioneer shall bear no responsibility for any conduit or drainage facility that Developer may install in the original location previously occupied by the "A" Drain for the purposes of draining water away from the Property.

Pioneer also provides written confirmation to Developer of its approval for Developer to construct, operate, repair and maintain twelve inch (12") water lines and twelve inch (12") sewer lines crossing the relocated "A" Drain at various locations more particularly depicted in the Crossing Plans listed in Exhibit B.

These written confirmations shall be collectively referred to hereinafter as the "Licenses."

2. Restrictions on Licenses. Developer expressly acknowledges and agrees that this Agreement does not grant Developer the right to install any property or equipment, except as may be described in this Agreement, or the right to impair any rights of Pioneer. This grant of the Licenses set forth in Section 1 of Subpart A is expressly conditioned upon the prior receipt by Developer of any and all necessary approvals from governmental entities and private parties for its activities to be performed under the terms of this Agreement, and is further expressly conditioned upon Pioneer's prior written approval of all drawings and plans concerning the activities to be conducted by Developer under this Agreement.

3. Term of Grant of Licenses. The term of the Licenses shall commence upon the effective date of this Agreement and shall continue for so long as Developer is in compliance with the terms of this Agreement. Pioneer may revoke the Licenses granted hereunder should Developer at any time fail to comply with the terms and conditions of this Agreement; provided, however, that Pioneer delivers to Developer written notice of such failure and Developer fails to cure the lack of compliance within fifteen (15) days of delivery of such written notice.

4. Abandonment of a Portion of the Existing "A" Drain Easement. In connection with the relocation of the existing "A" Drain as set forth in Section 1 of Subpart A, Pioneer agrees to abandon a portion of the existing "A" Drain easement, as more particularly described in Exhibit E, upon completion of the relocation of the "A" Drain and recording of this Agreement.

5. Grant of Easement. Developer and the Association hereby grant to Pioneer a perpetual easement for the relocated "A" Drain as set forth in Exhibit F. The easement conveys and grants to Pioneer all rights to the described real property for access, operation,

maintenance, repair, and replacement of its facilities, which includes the relocated and tiled "A" Drain. The easement shall not be used, unless otherwise herein provided, by any services provided to the Montecito Park Subdivision by private or public entities, including, but not limited to, the Utilities. Developer and the Association shall prevent such adverse use unless Pioneer grants express written consent pursuant to Section 8 of Subpart A of this Agreement, as long as Developer owns any real property encumbered by the easement.

6. Landscaping. Developer and the Association may plant low shrubs and/or grass within the area of the easements which do not exceed two-feet (2') in height at maturity and which in no way restrict Pioneer's access to and use of the "A" Drain, service roads, and paths. Developer and the Association shall not construct or install any permanent structures within the areas of the easements, including but not limited to statues, boulders, rocks, concrete, fences, or monuments, or install or plant any additional landscaping, such as trees or shrubs, other than the landscaping described in this Section. All expenses relating to the landscaping described herein shall be borne solely by Developer and the Association. It is expressly agreed that Pioneer shall not be responsible for any damages to any landscaping so installed by Developer resulting from Pioneer's operation, maintenance, replacement, or repair of the relocated "A" Drain.

7. Maintenance of the "A" Drain. Periodically, as part of the routine operation and maintenance of the "A" Drain, light and/or heavy maintenance of the "A" Drain is required to ensure its proper function. All maintenance of the relocated "A" Drain which lies within the Montecito Park Subdivision development shall be performed by Developer and/or the Association, and the cost of such maintenance shall be borne by Developer and/or the Association. Such maintenance shall include, without limitation, dredging of the relocated

"A" Drain to remove spoils, cleaning of the trash racks, weeding, trash collection, and other necessary manicuring of the landscaping along the relocated "A" Drain.

If the maintenance performed by Developer and/or the Association shall in any way prevent Pioneer's normal operation, maintenance, repair, or replacement of the "A" Drain, Pioneer shall notify in writing the Developer and/or manager of the Association of such problem. If Developer and/or the Association fail to rectify the problem, Pioneer may elect to perform the obligations of Developer and/or the Association. In the event that Pioneer performs the obligations of Developer and/or the Association as provided for under this Section, all costs and/or fees associated therewith shall be the sole responsibility of Developer and/or the Association, and Pioneer shall be entitled to litigate to collect such costs and fees. Furthermore, Pioneer shall not be responsible for any damage to landscaping and/or roadways caused by its operation, maintenance, and/or replacement of the relocated "A" Drain within the easement granted hereunder. This maintenance agreement between Developer and/or the Association shall in no way effect or limit Pioneer's ownership of its facilities and/or systems, including the relocated "A" Drain.

8. Utility Crossings. Unless Developer has previously disclosed utility locations by providing plans fully depicting the utility locations through a utility plan or a joint trench utility plan, Developer shall not allow any Utilities or any private party to cross any portion of the relocated "A" Drain, or otherwise use or encroach upon Pioneer's irrigation easements, without the express written consent of Pioneer. Said written consent may take the form of an addendum to this existing Agreement or, Pioneer, in its discretion, may require that separate license agreements be executed between Pioneer and the Utility or private party seeking to cross the relocated "A" Drain.

In the event that Developer has not provided utility plans and asserts that no Utility or private party will be crossing a Pioneer facility and/or system, Developer shall present to Pioneer proof of this fact in one of the following forms:

- (a) title report confirming that no other easements have been granted and recorded as of the date of recording of this Agreement, or
- (b) signed writings from the individual Utilities serving the development stating that they will not be crossing a Pioneer facility and/or system.

Absolutely no construction may proceed until said Developer or Utilities have met these siting/crossing requirements to the satisfaction of Pioneer.

9. Express Waiver. In the event that any Utilities or private parties do cross Pioneer facilities and/or systems, or share in the use of Pioneer's facility and/or system easements, said Utilities or private parties waive any and all claims against Pioneer, now and in the future, concerning or arising from Pioneer's water distribution, operation, and maintenance activities involving Pioneer's facilities and/or systems.

10. Installation and Inspection. Developer or their agents or contractors, shall perform all work contemplated by the terms of this Agreement in a workmanlike manner. Developer agrees to assume all responsibility for the construction contemplated under this Agreement, including general liability and costs for construction.

Any construction or other activities by Developer which may impede or impair the flow of water may only be performed during the non-irrigation season, which is usually between November 1 and March 15. Developer expressly acknowledges that, notwithstanding its assumption of certain responsibilities and receipt of certain rights under this Agreement, Pioneer does not relinquish its ownership rights in any portion of its facilities.

Subpart B. Pressurized Irrigation Construction, Operation, and Maintenance

1. Statutory Authority. Subpart B of this Agreement is made pursuant to and under the authority of Idaho Code Sections 43-330A through 43-330G (the "Act").

2. Warranties. The Pressurized Irrigation System Plans must be approved in writing by the engineering agent for Pioneer prior to beginning construction. Montecito Park Subdivision, if not already completed, shall be completed as soon as practical after the date of this Agreement. The Pressurized Irrigation System will also be completed as soon as practical after the date of this Agreement. Developer hereby represents and warrants that the Pressurized Irrigation System will be free of defects in material and workmanship and will be properly installed so that it is a fully functioning system which complies with the standards and specifications of Pioneer. Developer agrees to replace any portions of the Pressurized Irrigation System which fail because of defects in material and workmanship or improper installation for a period of two (2) years from the date of written acceptance of the Pressurized Irrigation System by Pioneer.

3. Substitutions. Developer represents that it will not use different construction procedures or substituted material in lieu of the procedures and materials described in the Pressurized Irrigation System Plans and Specifications unless previously approved in writing by Pioneer or Pioneer's engineer.

4. Permits. Developer represents that it has obtained or will obtain all necessary city, county, and state permits and approvals for construction of the Pressurized Irrigation System.

5. Easement. Developer hereby grants to Pioneer an easement for the operation, maintenance, repair, and replacement of the Pressurized Irrigation System. The

location of the easement for the pumphouse shall be as set forth in the legal description referenced in Exhibit G, attached hereto and made a part hereof. The location of the easement for the Pressurized Irrigation System shall be determined by the location of the pipelines, as finally installed, and the width of the easement shall be five (5) feet on either side of the centerline of each pipeline, unless otherwise stated. Within ten (10) days of recording the final plat for Montecito Park Subdivision, Developer shall provide to Pioneer a recorded copy of the final subdivision plat clearly depicting the location of the easement.

6. Inspection. Upon completion of the Pressurized Irrigation System, Developer shall provide Pioneer with as-built drawings of the Pressurized Irrigation System, and shall correct any existing defects identified during a walk through inspection by Pioneer. Developer shall also perform a pump and pressure test to the satisfaction of Pioneer. Prior to acceptance of the entire Pressurized Irrigation System and assumption of the responsibility for the operation and maintenance of the Pressurized Irrigation System, Developer shall provide Pioneer with a waiver(s) of lien(s) as evidence of Developer's payment to all subcontractors and material suppliers listed on a notarized contractor's affidavit at the time of completion of the construction of any and all segments of the Pressurized Irrigation System.

7. Cost of Construction. The cost of construction of the Pressurized Irrigation System has been, or shall be, paid in full by Developer and shall not be apportioned against the lots in Montecito Park Subdivision, except as herein provided. Any portion of the cost of construction of the Pressurized Irrigation System that is not paid upon completion of construction by Developer or by a third party on behalf of Developer shall constitute a lien against the lots in the Montecito Park Subdivision securing payment of the balance of the construction cost and payment of interest on any deferred installments of the construction cost.

The balance of the construction cost, if any, shall be included in the annual assessments levied by Pioneer against the Montecito Park Subdivision or individual lots therein, and any such assessment and its levy and collection shall be, as nearly as practicable, in accordance with the assessment, levy, and collection of other assessments levied upon lands in Pioneer Irrigation District. Said annual assessments levied by Pioneer shall comply with the requirements of the Act and other relevant provisions of state law.

8. Construction by Pioneer. Developer agrees that in the event of default by Developer under this Agreement, Pioneer may elect to perform Developer's obligations, if any, related to the construction and installation of the Pressurized Irrigation System, after providing thirty (30) days prior written notice to Developer of such alleged default and the intent of Pioneer to perform the obligations of Developer hereunder.

9. Ownership of Distribution System. The Pressurized Irrigation System shall be the property of Pioneer, shall be owned by Pioneer, and shall be transferred by Developer to Pioneer following delivery to Developer of Pioneer's written acceptance of the Pressurized Irrigation System and by delivery by Developer of lien waivers to Pioneer and a bill of sale substantially similar to the bill of sale attached hereto as Exhibit H.

10. Operation and Maintenance by Pioneer — Assessments for Operation and Maintenance. After complete transfer of ownership, as provided for in Section 9 of Subpart B, the Pressurized Irrigation System shall be operated, maintained, repaired, and replaced by Pioneer, and Pioneer may levy and collect annual assessments against each lot served by the Pressurized Irrigation System to defray the cost and expense of such operation, maintenance, repair, or replacement.

Pioneer shall have available for inspection by the lot owners in the Property, as subdivided, information on scheduled water assessments and the rules and regulations in connection with the provision of water, including the termination thereof. Pioneer shall bill such water assessments and shall collect such water assessments from the individual lot owners pursuant to state law. Water assessments for common areas and parking lots shall be billed to and collected from the Association.

11. Pressurized Irrigation System Boundaries. Pioneer's obligations concerning the ownership, operation, and maintenance of the Pressurized Irrigation System is limited to those areas of the delivery system up to and including the curb stop valves that service each lot. Pioneer is not responsible or obligated in any way to operate or maintain portions of the system beyond said curb stop valves.

12. Watering Schedule. Developer agrees that a watering schedule, approved by Pioneer in writing, shall be included in the Covenants, Contracts, and Restrictions ("CC&R's") for the Montecito Park Subdivision and any future phases of the Montecito Park Subdivision development. Upon recording of the CC&R's, Developer shall, within a reasonable time period, provide Pioneer with a copy of the CC&R's for the Montecito Park Subdivision.

13. Future Phases. Developer and Pioneer hereby acknowledge and agree that it is their mutual intent to have water delivered, and to deliver water to and through the Pressurized Irrigation System throughout the Montecito Park Subdivision development, including future phases, subject to the requirements contained herein in this Agreement.

Plans and Specifications for the distribution system for a pressurized irrigation system for future phases of the Montecito Park Subdivision development shall be substantially similar to the Pressurized Irrigation System Plans and Specifications found in Exhibit C, and

shall be submitted to Pioneer for review and approval in writing by Pioneer, or Pioneer's engineering agent, prior to construction of such distribution system(s). The pressurized irrigation system for all future phases of the Montecito Park Subdivision development shall be the property of and shall be owned by Pioneer, and shall be transferred by Developer to Pioneer within twenty (20) days of completion of the construction of such pressurized irrigation system. Such transfer shall be accomplished by delivery by Developer to Pioneer of a bill of sale substantially similar to the Bill of Sale attached hereto as Exhibit H and after written acceptance of that phase of the pressurized irrigation system by Pioneer.

Pioneer shall cooperate with Developer in the execution of any and all subdivision plats in connection with the Property. Pioneer shall do all things reasonably necessary to accomplish the delivery of water to and through the Pressurized Irrigation Systems in connection with the Montecito Park Subdivision development. All terms and provisions of this Agreement which are currently applicable to the Montecito Park Subdivision shall automatically apply to all future phases of the Montecito Park Subdivision development after the recording of the final subdivision plat for each phase, provided that the pump capacity of the Pressurized Irrigation System is adequate to provide adequate irrigation water to all of the lots in future phases of the Montecito Park Subdivision development. If the pump capacity is not adequate, as determined by Pioneer or Pioneer's engineering agent, Developer agrees to provide additional pump capacity sufficient to allow adequate water to be supplied to all lots in all phases the Montecito Park Subdivision development.

Subpart C. General Provisions

1. Indemnity. Developer, the Association, and any Utility or private party that crosses a Pioneer facility and/or system or uses Pioneer's easements, agrees to protect,

defend, indemnify, and hold Pioneer and its officers, directors, employees, members, and agents harmless from and against any and all liability, suits, losses, damages, claims, actions, costs, and expenses of any nature, including court costs and attorney fees, arising from or out of any acts or omissions of Developer, the Association, any crossing Utility, or private party, respectively, and their agents or contractors, related to or in connection with (a) their crossing of Pioneer's facilities; (b) use of the easements of Pioneer; (c) with the construction, operation, maintenance, repair or replacement of the Pressurized Irrigation System; (d) any activity under this Agreement; and (e) the exercise of any privileges or performance of any obligations by Developer, the Association, crossing Utility or private party hereunder.

Furthermore, Developer, the Association, and any crossing Utility or private party, agree to protect, indemnify, and hold Pioneer and its officers, directors, employees, members, and agents harmless from and against any and all liability, suits, losses, damages, claims, actions, costs, and expenses of any nature, including court costs and attorney fees, arising from or out of water quality violations, flooding, or any interruption or interference with the flow of water in Pioneer facilities and/or systems caused by any act or omission of Developer, the Association, any crossing Utility, private party, or their agents. Such Developer, the Association, and any crossing Utility or private party, shall be responsible for their own actions only, and not the actions of any other party hereunder. Each party's liability shall be separate only, and not joint.

2. No Liens. Developer and/or the Association shall allow no liens as a result of any labor performed or materials supplied in connection with Developer's and/or the Association's activities to attach to the relocated "A" Drain, the Pressurized Irrigation System, or to any adjacent lands held by Pioneer.

3. Limitations on Liability; Attorney Fees. The parties hereto agree that nothing herein contained shall be construed to create a joint venture, partnership, or other similar relationship which might subject any party to liability for the debts and/or obligations of the others, except as otherwise expressly agreed in this Agreement. No director, officer, staff member, agent, or designee of Pioneer shall incur any liability hereunder to Developer, the Association, Utility, or any other party in such person's individual capacity by reason of such person's actions hereunder or execution hereof. In the event any party hereto shall bring any action to enforce a breach of this Agreement, the prevailing party shall be entitled to recover reasonable costs and attorney fees from the nonprevailing party.

4. Professional Fees. Developer agrees to promptly pay all engineering costs or irrigation consulting fees incurred by Pioneer relating to design review and inspection of the Pressurized Irrigation System. Developer also agrees to promptly pay all legal expenses incurred by Pioneer relating to the negotiation, preparation, and execution of this Agreement. It is expressly agreed that Pioneer shall not be responsible for the payment of said costs or fees.

5. Entire Agreement. This Agreement contains the entire agreement between the parties hereto with respect to the subject matter of this Agreement. Amendments to this Agreement shall be made only by written instrument executed by each of the parties hereto.

6. Binding Effect. This Agreement shall bind the parties hereto and their respective heirs, personal representatives, successors, and assigns and shall also constitute a burden upon and appurtenance to the Property.

7. Severability. If any part of this Agreement is held to be illegal or unenforceable by a court of competent jurisdiction, the remainder of this Agreement shall be given effect to the fullest extent reasonably possible.

8. Survival. The terms, representations, provisions, covenants, and agreements shall survive the delivery of the Bill of Sale and shall remain binding upon and for the parties hereto until fully observed, kept, or performed.

9. No Waiver. The failure of a party to insist on the strict performance of any provision of this Agreement or to exercise any right or remedy upon a breach hereof shall not constitute a waiver of any provision of this Agreement or limit such party's right to enforce any provision or exercise any right.

10. Governing Law. This Agreement shall be construed under and governed by the laws of the State of Idaho.

11. Representations of Parties.

(a) Pioneer. Pioneer represents and warrants that: (i) it is an irrigation district organized and existing under and by virtue of the laws of the State of Idaho; (ii) it has the capacity to enter into and perform its obligations under this Agreement; (iii) all organizational and other actions required to authorize it to enter into and perform this Agreement have been properly taken; and (iv) this Agreement has been properly executed and delivered by Pioneer and is valid and binding upon Pioneer in accordance with its terms.

(b) Developer. Developer represents and warrants that: (i) it is an Idaho limited liability company duly organized and in good standing with the State of Idaho; (ii) it has the capacity to enter into and perform its obligations under this Agreement; (iii) all actions required to authorize the Developer to enter into and perform this Agreement have been properly taken; (iv) this Agreement has been properly executed and delivered by the Developer and is valid and binding upon the Developer in accordance with its terms; and (v) it has obtained all

permits, licenses, and acknowledgments required to conduct the activities to be performed under the terms of the Agreement.

(c) The Association. The Association represents and warrants that: (i) it is an Idaho corporation duly incorporated and in good standing in the State of Idaho; (ii) it has the capacity to enter into and perform its obligations under this Agreement; (iii) all actions required to authorize the Association to enter into and perform this Agreement have been properly taken; (iv) this Agreement has been properly executed and delivered by the Association and is valid and binding upon the Association in accordance with its terms; and (v) it has obtained all permits, licenses, and acknowledgments required to conduct the activities to be performed under the terms of the Agreement.

12. Developer's Authorization of Signature. Developer hereby warrants that the person signing this Agreement has been authorized to do so by Developer.

13. The Association's Authorization of Signature. The Association hereby warrants that the person signing this Agreement has been authorized to do so by the Association.

14. Notices. All notices, demands, requests, and other communications under this Agreement shall be in writing and shall be deemed properly served or delivered if delivered by hand to the party to whose attention it is directed or, when sent by mail, three (3) days after deposit in the United States mail, postage prepaid, addressed as follows:

PIONEER IRRIGATION DISTRICT
P.O. Box 426
Caldwell, Idaho 83606

MONTECITO PARK DEVELOPMENT, LLC
701 S. Allen Street, Suite 103
Meridian, Idaho 83642


MONTECITO PARK NEIGHBORHOOD ASSOCIATION, INC.
701 S. Allen Street, Suite 103
Meridian, Idaho 83642

Each party may change its address for delivery by written notice in the manner provided herein.

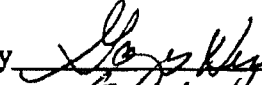
15. Recording. This Agreement shall be recorded upon execution in the office of the county recorder for each county in which any portion of the land covered by the Agreement is located.

IN WITNESS WHEREOF, the parties have hereunto caused their names to be subscribed to this Agreement of the date first set forth above.

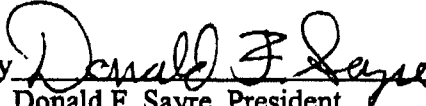
MONTECITO PARK DEVELOPMENT, LLC

By 
Its GARY D HIMES
MANAGER

MONTECITO PARK NEIGHBORHOOD
ASSOCIATION, INC.

By 
Its GARY D HIMES
PRES.

PIONEER IRRIGATION DISTRICT

By 
Donald F. Sayre, President
of its Board of Directors

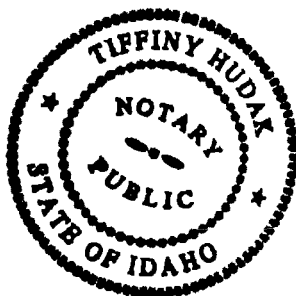
Attest:


Naida Kelleher, Secretary

STATE OF IDAHO)
County of Ada) ss.

On this 12th day of March, 2004, before me, the undersigned Notary Public in and for said state, personally appeared Gary D. Himes, known or identified to me to be the Manager of MONTECITO PARK DEVELOPMENT, LLC, an Idaho limited liability company, the person who executed the instrument on behalf of MONTECITO PARK DEVELOPMENT, LLC, and acknowledged to me that MONTECITO PARK DEVELOPMENT, LLC, executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

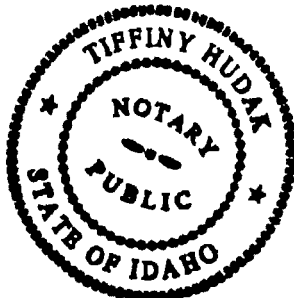


Tiffany Hudak
NOTARY PUBLIC FOR IDAHO
Residing at Boise
My Commission Expires 9/16/09

STATE OF IDAHO)
County of Ada) ss.

On this 12th day of March, 2004, before me, the undersigned Notary Public in and for said state, personally appeared Gary D. Himes, known or identified to me to be the President of MONTECITO PARK NEIGHBORHOOD ASSOCIATION, INC., an Idaho corporation, the person who executed the instrument on behalf of MONTECITO PARK NEIGHBORHOOD ASSOCIATION, INC., and acknowledged to me that MONTECITO PARK NEIGHBORHOOD ASSOCIATION, INC., executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

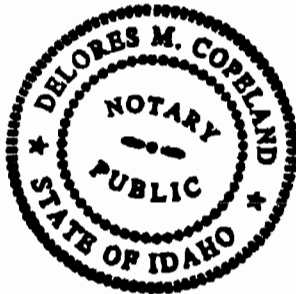


Tiffany Hudak
NOTARY PUBLIC FOR IDAHO
Residing at Boise
My Commission Expires 9/16/09

STATE OF IDAHO)
) ss.
County of Canyon)

On this 15 day of March, 2004, before me, the undersigned Notary Public in and for said state, personally appeared DONALD F. SAYRE known or identified to me to be the President of the Board of Directors of PIONEER IRRIGATION DISTRICT, the person who executed the instrument on behalf of the PIONEER IRRIGATION DISTRICT, and acknowledged to me that PIONEER IRRIGATION DISTRICT executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

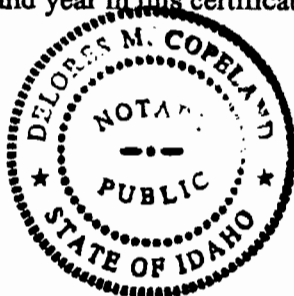


Delores M. Copeland
NOTARY PUBLIC FOR IDAHO
Residing at 18-21-2004
My Commission Expires Caldwell, ID

STATE OF IDAHO)
) ss.
County of Canyon)

On this 15 day of March, 2004, before me, the undersigned Notary Public in and for said state, personally appeared NAIDA KELLEHER known or identified to me to be the Secretary of PIONEER IRRIGATION DISTRICT, the person who executed the instrument on behalf of the PIONEER IRRIGATION DISTRICT, and acknowledged to me that PIONEER IRRIGATION DISTRICT executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Delores M. Copeland
NOTARY PUBLIC FOR IDAHO
Residing at Caldwell, ID
My Commission Expires 10-21-04

EXHIBIT A

Vicinity Map

Exhibit A
BOI_MT2:533997.3

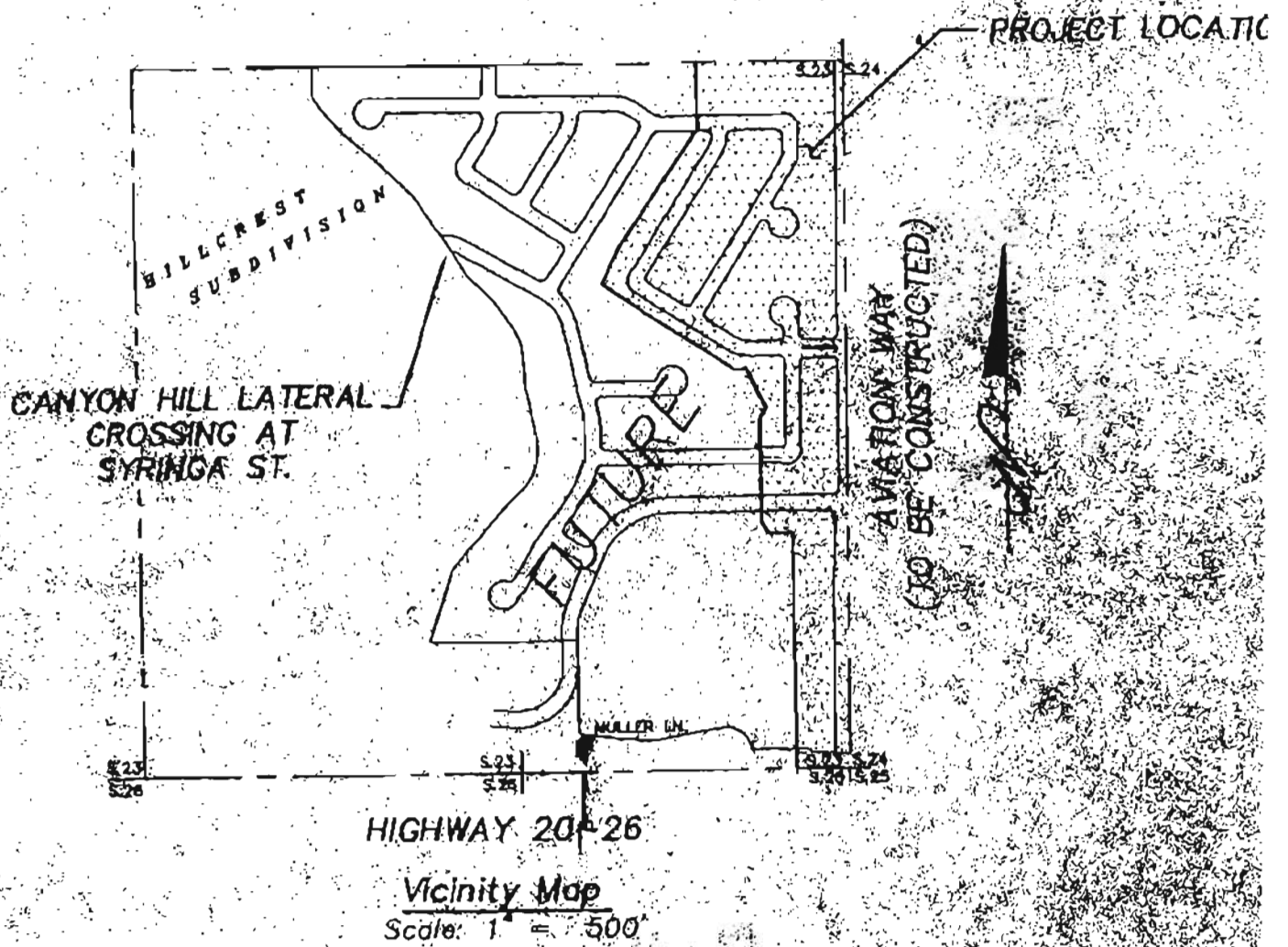


EXHIBIT B

Crossing Plans and Specifications

Please refer to the following plans prepared by Earl, Mason & Stanfield, Inc. for Montecito Park Subdivision, Job No. JY1003:

Cover Sheet, Sheet 1 of 25, dated 1/22/04

Subdivision Layout, Sheets 2, 2A, and 2B of 27, dated 2/17/04

Specifications, Sheet 3 of 25, dated 2/17/04

Aviation Way, Sheets 5, 7 and 8 of 25, dated 1/22/04

EXHIBIT C

Pressurized Irrigation System Plans and Specifications

Please refer to the following plans prepared by Earl, Mason & Stanfield, Inc. for Montecito Park Subdivision, Job No. JY1003:

Cover Sheet, Sheet 1 of 25, dated 1/22/04

Subdivision Layout, Sheets 2, 2A, and 2B of 27, dated 2/17/04

Specifications, Sheet 3 of 25, dated 2/17/04

Irrigation Plan, Sheet 25 of 25, dated 2/17/04

Irrigation Pump Station, Sheets IPS1 and 2 of 2, dated 2/17/04

EXHIBIT D

Tiling and Relocation Plans and Specifications

Please refer to the following plans prepared by Earl, Mason & Stanfield, Inc. for Montecito Park Subdivision, Job No. JY1003:

Cover Sheet, Sheet 1 of 25, dated 1/22/04

Subdivision Layout, Sheets 2, 2A, and 2B of 27, dated 2/17/04

Specifications, Sheet 3 of 25, dated 2/17/04

"A" Drain Relocation, Sheets 1D, 2D, 3D, and 4D of 4, dated 3/3/04

EXHIBIT E

Legal Description of the Vacation of a Portion of the Existing "A" Drain Easement

Exhibit E
BOI_MT2533997.3



IDAHO
SURVEY
GROUP

1450 East Watertower St.
Suite 150
Meridian, Idaho 83642

Phone (208) 846-8570
Fax (208) 884-5399

ISG Project No.

October 16, 2003

A-DRAIN EASEMENT VACATION MONTECITO PARK

A 100.00 foot wide strip of land located in the East $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of Section 23, T.4N., R.3W., B.M., Canyon County, Idaho, more particularly described as follows: Commencing at the $\frac{1}{4}$ corner common to Section 24 and the said Section 23, from which the Southeast corner of said Section 23 bears South $00^{\circ}34'57''$ West, 2638.13 feet; Thence along the East-West mid-section line North $89^{\circ}37'22''$ West, 644.55 feet to a point on the existing easterly right-of-way of the A-Drain, said point being the **REAL POINT OF BEGINNING**.

Thence South $19^{\circ}12'07''$ East, 1762.41 feet;

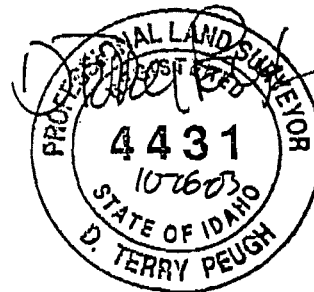
Thence South $00^{\circ}34'57''$ West, 125.37 feet;

Thence South $02^{\circ}41'05''$ West, 154.42 feet;

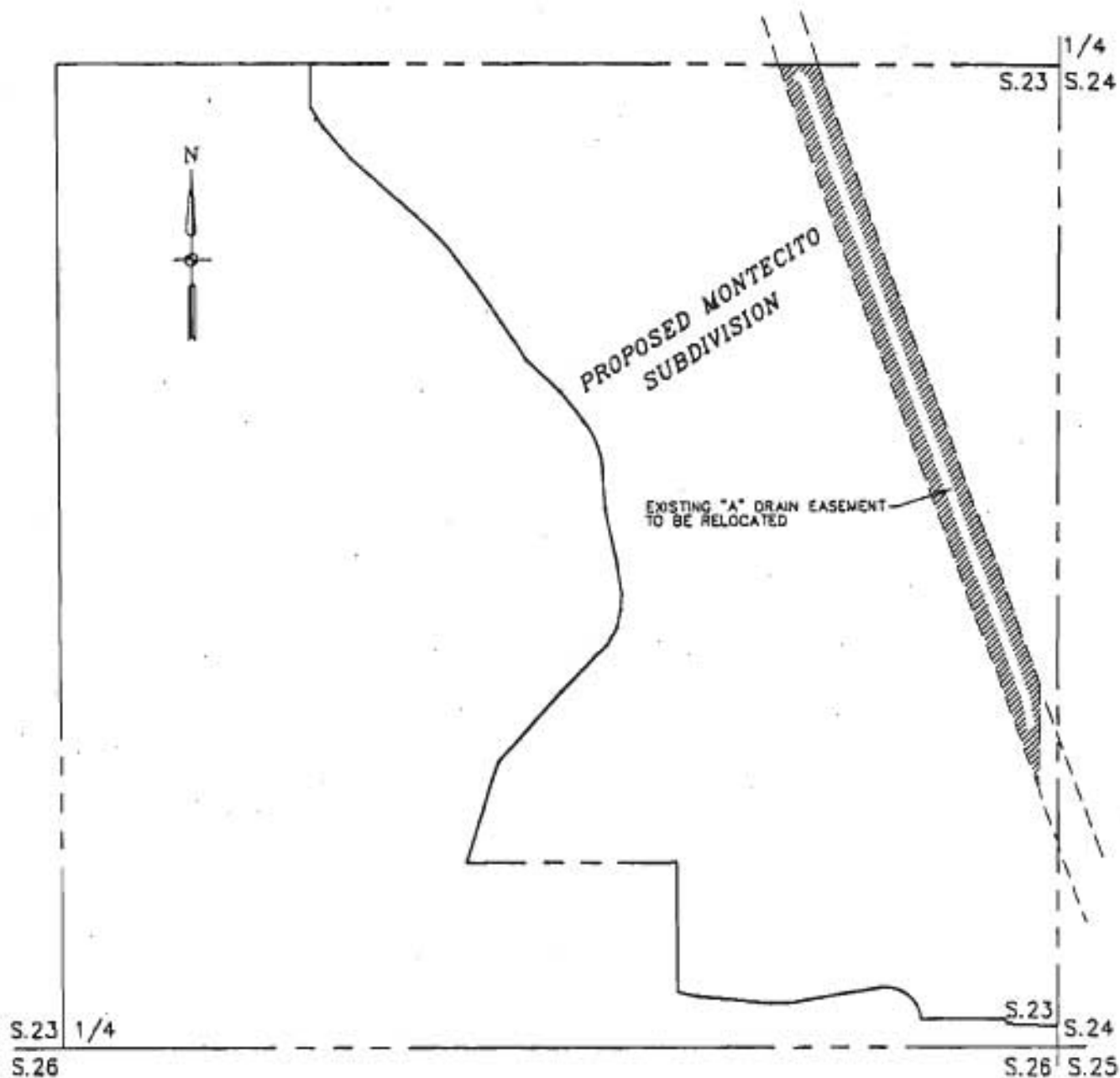
Thence North $19^{\circ}12'07''$ West, 2059.24 feet to a point on the East-West mid-section line;

Thence along said line South $89^{\circ}37'22''$ East, 106.14 feet to the Point of Beginning.

Prepared by:
IDAHO SURVEY GROUP, PC



D. Terry Peugh, P.L.S.



LOCATED IN THE EAST $\frac{1}{2}$ OF SECTION 23, T.4N., R.3W., B.M.,
CALDWELL, CANYON COUNTY, IDAHO



IDAHO
SURVEY
GROUP, P.C.

1480 E. WATERTOWER ST.
SUITE 100
MERIDIAN, IDAHO 83642
(208) 648-6270

PARTIAL VACATION OF THE
A-DRAIN EASEMENT

JOB NO.
02-377-01
SHEET NO.
1

EXHIBIT F

Legal Description of Easement for the Relocated "A" Drain

Exhibit F
BOI_MT2:533997.3



IDAHO
SURVEY
GROUP

1450 East Watertower St.
Suite 150
Meridian, Idaho 83642

Phone (208) 846-8570
Fax (208) 884-5399

ISG Project No.

October 16, 2003

RE-LOCATED A-DRAIN EASEMENT MONTECITO PARK

A parcel of land located in the East $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of Section 23, T.4N., R.3W., B.M., Canyon County, Idaho, more particularly described as follows:
Commencing at the $\frac{1}{4}$ corner common to Section 24 and to said Section 23, from which the Southeast corner of said Section 23 bears South $00^{\circ}34'57''$ West, 2638.13 feet;
Thence along the East-West mid-section line North $89^{\circ}37'22''$ West, 33.00 feet to the
REAL POINT OF BEGINNING.

Thence South $00^{\circ}34'57''$ West, 1938.62 feet;

Thence North $19^{\circ}12'07''$ West, 118.17 feet;

Thence North $00^{\circ}34'57''$ East, 1686.54 feet;

Thence North $49^{\circ}48'35''$ West, 63.62 feet;

Thence North $89^{\circ}37'22''$ West, 554.10 feet;

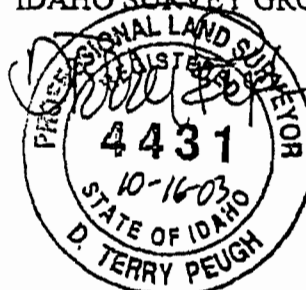
Thence North $40^{\circ}19'18''$ West, 44.01 feet;

Thence North $56^{\circ}32'52''$ West, 85.45 feet;

Thence North $00^{\circ}36'41''$ East, 20.00 feet to a point on the East-West mid-section line;

Thence along said line South $89^{\circ}37'22''$ East, 743.70 feet to the Point of Beginning.

Prepared by:
IDAHO SURVEY GROUP, PC



D. Terry Peugh, P.L.S.

EXISTING 100' "A" DRAIN
EASEMENT

1/4
S.23 S.24



PROPOSED MONTECITO
SUBDIVISION

40'

RELOCATED "A" DRAIN
EASEMENT

EXISTING 100' "A" DRAIN
EASEMENT

S.23 1/4
S.26

S.23 S.24
S.26 S.25

LOCATED IN THE EAST 1/2 OF SECTION 23, T.4N., R.3W., B.M.,
CALDWELL, CANYON COUNTY, IDAHO



IDAHO
SURVEY
GROUP P.C.

1450 E. WATERTOWER ST.
SUITE 100
MERIDIAN, IDAHO 83402
(208) 846-4375

NEW A-DRAIN EASEMENT

1508

208 40
03-377-01

SHEET NO.

2

EXHIBIT G

Legal Description for the Pressurized Irrigation System Pumphouse

Exhibit G
BOI_MT2:533997.3

EARL, MASON, & STANFIELD, INC.

PROFESSIONAL ENGINEERS, LAND SURVEYORS & PLANNERS

314 BADIOLA STREET
CALDWELL, IDAHO 83605

TELEPHONE: (208) 454-0256

FAX: (208) 454-0979

Email: rgray@emands.net

FOR: Hubble Homes
JOB NO.: JY1003
DATE: February 13, 2004
RE: Irrigation Pump Station Easement for Montecito Subdivision

IRRIGATION PUMP STATION EASEMENT

Permanent easement and right of way for the purpose of locating, establishing, constructing, maintaining, repairing and operating an "Irrigation Pump Station", together with the right to excavate and refill ditches and/or trenches for the location of said pump station along with it's apparatus', the right to remove bushes, trees, undergrowth and other obstructions interfering with the location, construction and maintenance of said pump station and the right of ingress and egress in, from, to and over said easement for the purpose of inspecting, maintaining and repairing such pump station.

The perpetual easement and right of way hereby given, conveyed and transferred for maintaining, repairing and operating said pump station is described in general language as follows and as shown on Exhibit "B" attached:

A parcel of land located in a portion of Lot 1 of Hillcrest Subdivision as on file in Book 3 of Plats at Page 10 in the Office of the Recorder of Canyon County, Idaho, said Lot 1 is located in the NW 1/4 SE 1/4 of Section 23, Township 4 North, Range 3 West, Boise Meridian, Caldwell, Canyon County Idaho, more particularly described as follows:

Commencing at the NE corner of said SE 1/4, (East 1/4 corner of said section 23), said corner monumented with a found 5/8 inch diameter iron pin;

Thence N. 89° 37' 22" W., a distance of 1331.40 feet along the northerly boundary of said SE 1/4 to the NE corner of said NW 1/4 SE 1/4, (Center-east 1/16 corner of said section 23), said corner monumented with a found 5/8 inch diameter iron pin;

Thence continuing N. 89° 37' 22" W., a distance of 665.70 feet along the northerly boundary of said NW 1/4 SE 1/4 to a found 1/2 inch diameter iron pin;

Thence leaving the northerly boundary of said NW 1/4 SE 1/4, S. 0° 15' 55" W., a distance of 30.00 feet to the NW corner of said Lot 1;

Thence continuing S. 0° 15' 55" W., a distance of 14.89 feet along the westerly boundary of said Lot 1 to the **POINT OF BEGINNING** of said easement;

Thence continuing along the westerly boundary of said Lot 1, S. $0^{\circ} 15' 55''$ W., a distance of 58.01 feet to a point;

Thence leaving the westerly boundary of said Lot 1, N. $56^{\circ} 06' 30''$ E., a distance of 58.07 feet to a point;

Thence N. $33^{\circ} 53' 30''$ W., a distance of 48.00 feet to a point;

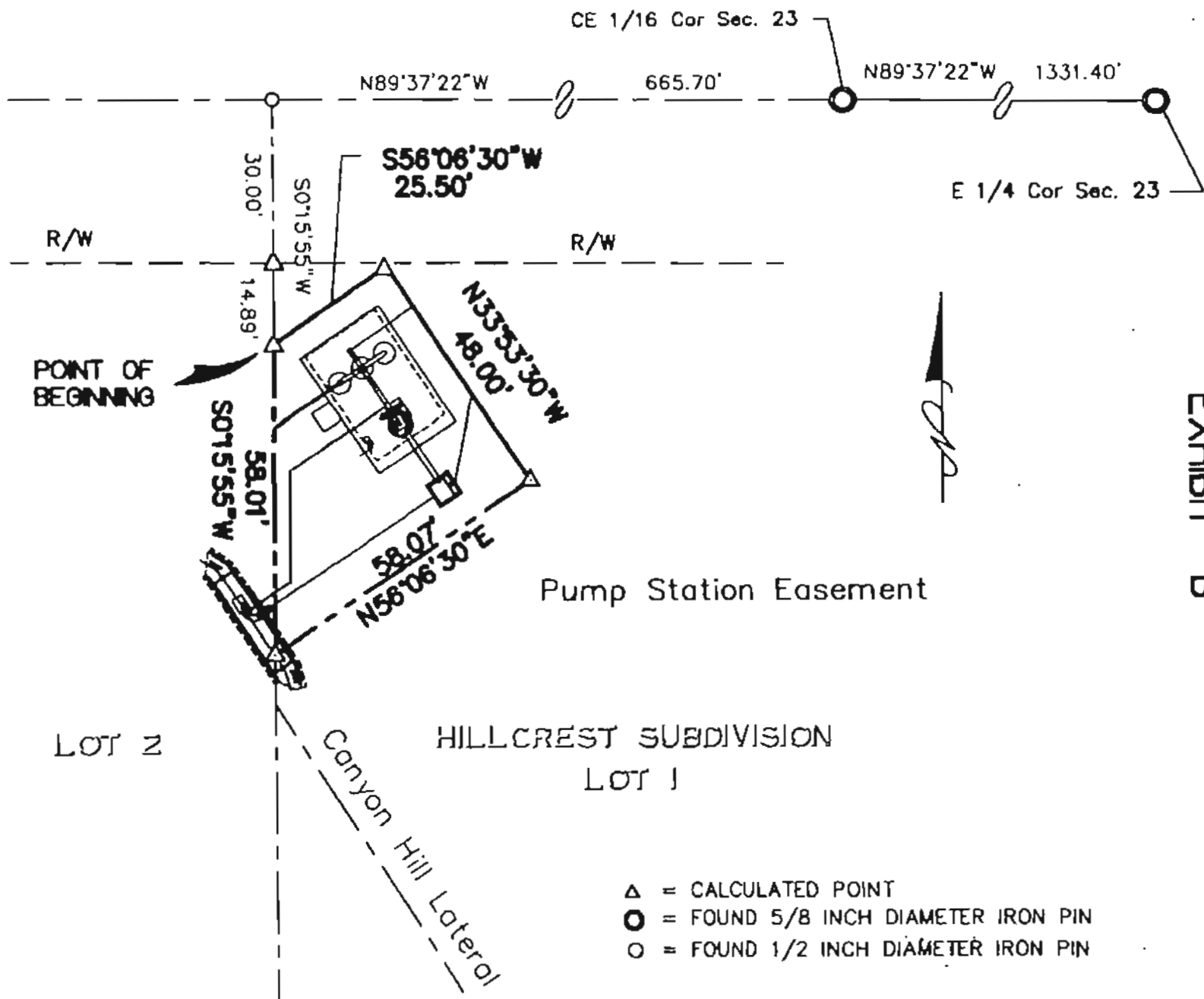
Thence S. $56^{\circ} 06' 30''$ W., a distance of 25.50 feet to the **POINT OF BEGINNING**.

This parcel contains 2,005 square feet more or less.

Also, this parcel is **SUBJECT TO** all easements and rights-of-way of record or implied.



EXHIBIT "B"



REVISION

APPROVED

CITY ENGINEER

IRRIGATION PUMP STATION EASEMENT
FOR MONTECITO SUBDIVISION

NW 1/4 SE 1/4 SECTION 23, T4N, R3W, B7L,
CALDWELL CANYON COUNTY, IDAHO

SMITH, BRADSHAW & STEINHAUS, INC.
Professional Engineers, Land Surveyors & Planners

312 South 9th Street, 2nd Floor
Tucson, AZ 85724
(520) 444-0044
(520) 444-0775 Fax

DRAWN BY: SCALE: DATE: JOB NO.

RAG

1" =

NTS

2/16/84

JY1883

DWG NO. MONTECITO-JY1883, SURVEY
PUMP STATION EASEMENT/FLX

EXHIBIT H

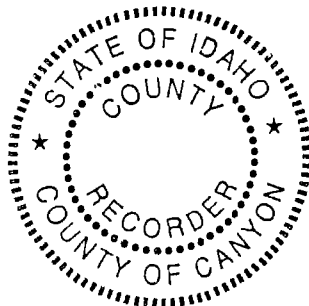
BILL OF SALE

KNOW ALL PERSONS BY THESE PRESENTS that on 12th day of March, 2004, MONTECITO PARK DEVELOPMENT, LLC, hereinafter referred to as "Seller," for and in consideration of the sum of One and No/100 Dollars (\$1.00), and other good and valuable consideration in hand paid and the sufficiency whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto PIONEER IRRIGATION DISTRICT, hereinafter referred to as "Buyer," and its assigns, the following personal property:

The Pressurized Irrigation System specifically includes all appurtenances, pumps, pumphouses, and related facilities, including electrical power, a mainline, connecting lateral pipelines, valves, service boxes, individual lot delivery lines and facilities, and all related equipment, parts, and materials, including, but not limited to, those items of personal property comprising the Pressurized Irrigation System as shown on the engineering record drawings prepared by *Earl, Mason & Stanfield, Inc.* for Montecito Park Subdivision, Job No. JY1003.

TO HAVE AND TO HOLD the same to Buyer, and its assigns, forever; and Seller does for its covenant agree to warrant and defend the sale of said personal property, hereby made, unto Buyer, and its assigns, against all and every person lawfully claiming the same.

IN WITNESS WHEREOF, Seller does hereunto set his hand the day and year first above written.



MONTECITO PARK DEVELOPMENT, LLC

By *[Signature]*
Gregory D. Humes
Its MANAGER

State of Idaho } ss.

County of Canyon
I hereby certify that the foregoing instrument is
a true and correct copy of the original as the
same appears in this office.
DATED 8-31-09

William H. Hurst, Clerk of the District Court
and Ex Officio Recorder.

By *[Signature]* Deputy

Exhibit G
BOI_MT2:533887.3

EXHIBIT B
TO AFFIDAVIT OF DAWN C. FOWLER

RIGHT-OF-WAY AGREEMENT

THIS INDENTURE, Made this 7th day of December, 1936,
between G. C. MULLER and KATHERINE MULLER, his wife, as first
parties, and PIONEER IRRIGATION DISTRICT, an irrigation district
organized under the laws of the State of Idaho, the second
party,

WITNESSETH, That WHEREAS, the second party is causing
a drainage ditch to be dug and constructed over and across the
following described lands belonging to first parties, to-wit:

Southeast Quarter of Southeast Quarter, and
Northeast Quarter of Southeast Quarter, of
Section Twenty-three (23), in Township Four
(4) North, Range Three (3) West of the Boise
Meridian, in Canyon County, Idaho;

and

WHEREAS, said first parties desire that said drainage
ditch be promptly completed;

NOW, THEREFORE, In consideration of second party
completing the construction of said drainage ditch through
said lands of first parties, in the same manner as it is now
being constructed, said first parties do hereby grant unto
said Pioneer Irrigation District the right, privilege and
authority to so complete the construction of said drainage
ditch over and across said land, together with the perpetual
right of way and easement over said lands for the operation
and maintenance of said ditch for drainage purposes, together
with the necessary spoil banks in connection therewith; and

in consideration thereof second party agrees that for the remainder of said ditch which now remains unfinished through said lands of first parties it will cause the spoil bank to be placed entirely on the east side of said ditch as it is constructed, and also agrees, at its own expense, to construct either a bridge across said ditch or make a passage way over the same by use of a covered tile, so first parties may have a crossing over said ditch upon their said land.

This agreement shall be binding on the heirs, executors, administrators, successors and assigns of all parties hereto.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals, and the said second party, by resolution of its Board of Directors, duly and regularly adopted at a meeting thereof held on the 12th day of December, 1936, has caused these presents to be subscribed by its President and Secretary, and its corporate name and seal to be hereunto affixed, the day and year in this agreement first above written.

[Signature] (SEAL)

[Signature] (SEAL)

PIONEER IRRIGATION DISTRICT

BY [Signature]
President

ATTEST:

[Signature]
Secretary.

STATE OF IDAHO

COUNTY OF CANYON

ss.

On this 16 day of December, 1936, before me,

Wm. C. Caldwell, a Notary Public in and for said State, personally appeared G. C. Muller and Katherine Muller, his wife, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Wm. C. Caldwell
Notary Public for Idaho,
Residing at Caldwell, Idaho.

RIGHT-OF-WAY AGREEMENT

Between
G. C. MULLER, et ux
and
PIONEER IRRIGATION DISTRICT

Dated December 7, 1936

FILED
A.M. 2:56 P.M.

SEP 03 2009

CANYON COUNTY CLERK
K CANNON, DEPUTY

Scott L. Campbell, ISB No. 2251
Bradley J Williams, ISB No. 4019
Tara Martens, ISB No. 5773
Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
18946.0059

Attorneys for Plaintiff / Counterdefendant
Pioneer Irrigation District

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

AFFIDAVIT OF WILLIAM J. MASON

ORIGINAL

STATE OF IDAHO)
) ss.
County of Canyon)

WILLIAM J. MASON, having been duly sworn upon oath, deposes and states as follows:

1. I am a professional civil engineer and a principal in the engineering firm Mason & Stanfield, Inc. I have engineering experience in the areas of hydraulics and land development. I have more than 15 years of experience in roadway and drainage system and grading plan design, project management, construction surveying, and construction observation. My experience includes rural and urban roadway and drainage; flat and mountainous roadway and drainage; storm water controls; erosion and sediment control systems and small to large sized grading plans. I have provided engineering services to Pioneer since approximately 1999 and am familiar with Pioneer's irrigation delivery and drainage system and facilities. I have also been retained by Pioneer to provide expert opinion testimony in this matter. I also hold a Land Surveyor-in-Training license. My business address is 314 Badiola Street, Caldwell, Idaho 83605. I make this Affidavit based upon my personal knowledge.

2. I have reviewed the real property legal description within the "Right-of-Way Agreement" of December 11, 1936, executed by G.C. Muller and Katherine Muller in favor of Pioneer. Based upon my review of that document and my knowledge of Pioneer's system and facilities, and in my professional opinion, that document describes a portion of the historic location of Pioneer's "A" Drain facility.

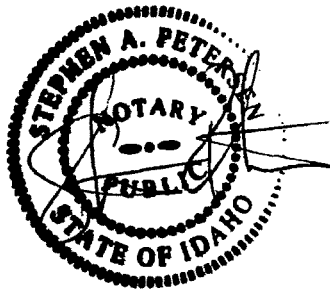
3. I have reviewed the real property legal description within the "Combined License and Construction, Operation, and Maintenance Agreement for Montecito Park Subdivision" dated March 15, 2004, Instrument No. 200414748 of the records of Canyon

County, Idaho. Based upon my review of that document and my knowledge of Pioneer's system and facilities, and in my professional opinion, that document describes a portion of the current location of Pioneer's "A" Drain facility, which was relocated in conjunction with the development of the Montecito Park Subdivision, and which "A" Drain currently receives urban stormwater discharges from the "A-15" and "A-17" outfalls that have been identified for potential removal in this litigation.

Further your affiant sayeth naught.

William J. Mason
William J. Mason

SUBSCRIBED AND SWORN to before me this 1ST day of September, 2009.



NOTARY PUBLIC FOR IDAHO
Residing at MIDDLETON, IDAHO
My Commission Expires SEPT. 29 2014

CERTIFICATE OF SERVICE

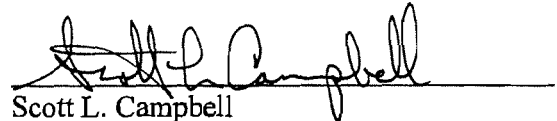
I HEREBY CERTIFY that on this 30 day of September, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF WILLIAM J. MASON** to be served by the method indicated below, and addressed to the following:

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
1301 12th Avenue
P.O. Box 65
Nampa, ID 83653-0065
Fax: 467-3058

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

J. Fredrick Mack
Erik F. Stidham
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, ID 83701-2527
Fax: 343-8869

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile


Scott L. Campbell

9-18 Culet
FILED
A.M. 145 P.M.

SEP 09 2009

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Scott L. Campbell, ISB No. 2251
Bradley J Williams, ISB No. 4019
Tara Martens, ISB No. 5773
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
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Telephone (208) 345-2000
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18946.0059

Attorneys for Plaintiff / Counterdefendant
Pioneer Irrigation District

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

**PIONEER IRRIGATION DISTRICT'S
SUPPLEMENTAL REBUTTAL EXPERT
WITNESS DISCLOSURE**

COMES NOW Pioneer Irrigation District ("Pioneer") by and through undersigned counsel of record and in accordance with the Court's Order Granting Amended Stipulation for Scheduling and Planning, entered July 7, 2009, the parties' First Amended Stipulation for Scheduling and Planning, dated June 2, 2009, Idaho Rule of Civil Procedure 26(b)(4), and its previous Rebuttal Expert Witness Disclosure, dated August 24, 2009, and hereby discloses the attached rebuttal expert report of Dr. Christian R. Petrich.

**I.
EXPERT WITNESSES**

**A. Christian R. Petrich, Ph.D., P.E., P.G.
SPF WATER ENGINEERING, LLC**

As noted in Pioneer's previous Rebuttal Expert Witness Disclosure, dated August 24, 2009, Dr. Petrich was out of the country and unavailable to furnish his rebuttal report until now. Dr. Petrich's rebuttal and responsive opinions are based upon, and include without limitation, Plaintiff Pioneer Irrigation District's Expert Witness Disclosure, dated July 10, 2009, any reports attached thereto and any supplementation thereof; Counterdefendant Pioneer Irrigation District's Expert Witness Disclosure, dated August 10, 2009; deposition testimony to date and to be provided in the future; and the rebuttal reports of Drs. Porter and Brockway and Mr. Ewbank and Mr. Mason served with Pioneer's previous Rebuttal Expert Witness Disclosure and all items referenced in the attached report. Consequently, Pioneer expressly incorporates by reference herein the entirety of its Rebuttal Expert Witness Disclosure, dated August 24, 2009, including, but not limited to, the general reservations expressed therein.

**II.
GENERAL RESERVATIONS**

As discovery in this matter is continuing, this disclosure may be updated as additional depositions are taken and additional facts become known.

Pioneer has just begun deposing City representatives, expert witnesses, and lay witnesses. At present, City has disclosed only its advancing and responding expert witness to date pursuant to Idaho Rule of Civil Procedure 26(b)(4). As such, Pioneer reserves the right to supplement and amend this disclosure in the event the lay or expert testimony and/or opinions disclosed and/or rendered by expert witnesses retained by the City, either through written reports, depositions, or written discovery answers, require Pioneer to retain additional or substitute expert witnesses.

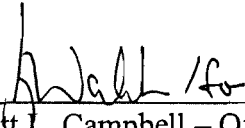
Pioneer reserves the right to supplement this disclosure in the event additional facts and information become known prior to trial that would necessitate Pioneer to retain additional expert witnesses.

Pioneer reserves the right to supplement this disclosure in the event the individuals identified herein become unavailable to testify at trial.

By making this disclosure, Pioneer does not represent that it will call all the disclosed witnesses or that any of the disclosed witnesses will be present at trial.

DATED this 8th day of September, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Scott L. Campbell – Of the Firm
Attorneys for Pioneer Irrigation District

CERTIFICATE OF SERVICE

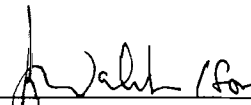
I HEREBY CERTIFY that on this 8th day of September, 2009, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT'S SUPPLEMENTAL REBUTTAL EXPERT WITNESS DISCLOSURE** to be served by the method indicated below, and addressed to the following:

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
1301 12th Avenue
P.O. Box 65
Nampa, ID 83653-0065
Fax: 467-3058

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J. Fredrick Mack
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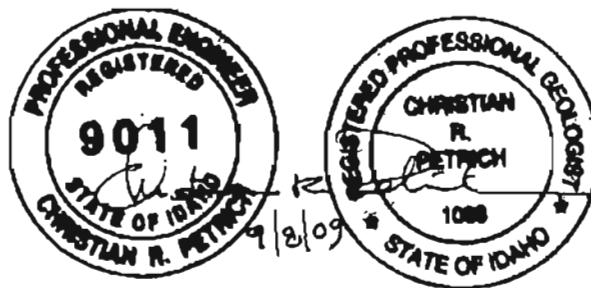
Scott L. Campbell

Rebuttal Report to Caldwell Expert Witness Disclosures

Prepared by
Christian R. Petrich, Ph.D., P.E., P.G.
SPF Water Engineering, LLC
300 East Mallard Drive, Suite 350
Boise, ID 83706

Prepared for
Pioneer Irrigation District
PO Box 426
Caldwell, ID 83606

In the Matter of
Pioneer Irrigation District vs. City of Caldwell
Case No. CV08-556-C



September 8, 2009



Executive Summary

This report rebuts selected comments made by City of Caldwell consultants regarding documentation submitted by Pioneer Irrigation District as part of Third District Court Case No. CV 08-556-C. Primary conclusions from this rebuttal include the following:

1. The City of Caldwell's consultants suggest that stormwater retention and infiltration is somehow inconsistent with the purpose of Pioneer Irrigation District drains. However, the concept of effective stormwater retention is *completely* consistent with the purpose of Pioneer Irrigation District's system of drains – the drains were designed and constructed to collect shallow ground water discharge.
2. Absent effective stormwater retention/detention, impervious surfaces in urbanized areas will lead to increased peak stormwater discharge compared to non-urbanized, pre-development areas. This concept is clearly recognized in the City's stormwater management manual.
3. Increased peak discharge rates from impervious, urban land surfaces can be mitigated by effective retention/detention systems. However, poorly designed, poorly constructed, and/or poorly maintained retention/detention facilities will not effectively mitigate increased peak discharge from impervious, urban land surfaces.
4. The City of Caldwell Stormwater Management Manual contains provisions for stormwater detention facilities. The manual mentions retention facilities, but strongly discourages the use of retention facilities.
5. The Pioneer Irrigation District currently receives inflows from stormwater discharge points. Thus, from a hydrologic perspective, it is reasonable to expect that the District (as recipient of stormwater discharge) would have authority to ensure that (1) retention facilities are properly designed and constructed, (2) discharge from detention facilities (if authorized by the District) is directed to a portion of the Pioneer Irrigation District system having the capacity to accept the stormwater inflow, (3) inflows have acceptable water quality, (4) the District has the ability to limit inflows during maintenance periods, and (5) the retention/detention systems are properly maintained to ensure long-term effectiveness.
6. An inference was made that drains should receive direct stormwater runoff from urbanized lands because the drains have historically received direct stormwater runoff from the same lands under pre-development conditions. This argument ignores the reality that agricultural lands are able to accept infiltration, resulting in a lower magnitude of discharge compared to urbanized areas with impervious surfaces such as roads and parking lots.

7. Diversion rates from the Boise River into the Phyllis Canal (such as those provided by Mr. Koreny) represent an incomplete picture of Pioneer Irrigation District canal and lateral capacity. The canal system also receives water from the Boise River via the Highline Canal, and from multiple drains and wells into both the Phyllis and Highline Canals. The water level in a given delivery-system channel depends, in part, on the presence of check structures designed to maintain water levels and diversions from delivery channels by individual irrigators. Pioneer Irrigation District personnel maintain that many canals and laterals operate at or close to full capacity during all or parts of a typical summer irrigation season.

Table of Contents

A.	Introduction	1
B.	Response to Comments by Mark Forest.....	1
	B.1. Forest Comment:	1
	Petrich Rebuttal:.....	2
	B.2. Forest Comment:	2
	Petrich Response:.....	2
	B.3. Forest Comment:	4
	Petrich Response:.....	4
	B.4. Forest Comment:	4
	Petrich Response:.....	4
	B.5. Forest Comment:	5
	Petrich Response:.....	5
	B.6. Forest Comment:	5
	Petrich Response:.....	5
	B.7. Forest Comment:	7
	Petrich Response:.....	8
	B.8. Forest Comment:	8
	Petrich Response:.....	8
C.	Response to Comments by John Koreny.....	9
	C.1. Koreny Comment:.....	9
	Petrich Rebuttal:.....	9
	C.2. Koreny Comment:.....	9
	Petrich Rebuttal:.....	10
D.	Response to Comments by Michael Murray	10
	D.1. Murray Comment:	10
	Petrich Rebuttal:.....	10
E.	Response to Comments by Jack Harrison	11
	E.1. Harrison Comment:.....	11
	Petrich Rebuttal:.....	11
F.	References	12

List of Figures

Figure 1. Illustration of detention storage volume (Urbonas and Roesner, 1993, pg. 28-26).	6
Figure 2. Illustration of conceptualized storage requirements for a detention basin designed to keep flood peaks from an urbanizing catchment at rural levels (from Dunne and Leopold, 1978, pg 419).	7

A. INTRODUCTION

At the request of the Pioneer Irrigation District, SPF Water Engineering, LLC (SPF) reviewed the role of Pioneer Irrigation District canals, laterals, and agricultural drains in the context of local ground and surface water hydrology (Petrich, 2009). The report was disclosed in the matter of the District's Amended Complaint for Declaratory and Injunctive Relief against the City of Caldwell, Idaho (Third District Court Case No. CV 08-556-C).

Consultants representing the City of Caldwell prepared comments regarding the SPF report and other reports prepared by Pioneer Irrigation District consultants. This report addresses comments submitted by City of Caldwell's consultants in the following documents:

1. Response to Expert Disclosures, Review of City of Caldwell Municipal Stormwater Management Manual, prepared by Mark Forest, HDR Engineering, August 10, 2009.
2. Expert Report, prepared by John S. Koreny, HDR Engineering, August 10, 2009.
3. Untitled report prepared by Michael Murray, HDR Engineering, August 10, 2009.
4. Lower Boise River Water Quality and Caldwell Storm Water Quality Management, prepared by Jack Harrison, HyQual, P.A., August 10, 2009

B. RESPONSE TO COMMENTS BY MARK FOREST

Mr. Forest contends that the Petrich report (Petrich, 2009) contains omissions, unsupported assumptions and/or conclusions, and insufficient analysis or is inconsistent with opinions offered by other Pioneer Irrigation District experts. This section addresses Mr. Forest's comments.

B.1. Forest Comment:

Mr. Forest opines that the concept that "future development should be required to retain and infiltrate a larger portion of the stormwater from a development" is somehow inconsistent with the concept that "drains were constructed to lower groundwater levels though positive drainage of tailwater and to provide a means for high groundwater that was the result of years of irrigation of agricultural fields has raise (sic) the groundwater levels dramatically"¹ and that "encouraging more recharge into the groundwater rather than providing for

¹ *Response to Expert Disclosures, Mark Forest, August 10, 2009, pgs. 9-10.*

positive drainage of stormwater is counter to the objective of the Pioneer Irrigation District's system of drains"².

Petrich Rebuttal:

Contrary to Mr. Forest's assertion, the concept of stormwater retention and infiltration is *completely* consistent with the purpose of drains. First, infiltration from effective retention facilities becomes shallow ground water flow that ultimately discharges into a Pioneer Irrigation District drain or other surface channel. The sequence of infiltration, shallow ground water flow, and subsequent surface discharge creates a lag time between a precipitation event and arrival of the infiltrated water at a drain or other surface channel. The spatial and temporal distribution of infiltration effectively reduces the magnitude of a surface-water runoff event. The spatial and temporal distribution of stormwater infiltration reduces direct, higher magnitude runoff events into the Pioneer Irrigation District delivery and drain system following a high-intensity precipitation event.

Second, water infiltration through retention ponds provides an opportunity for filtration and contaminant degradation that does not occur with direct stormwater runoff into the Pioneer Irrigation District channel system. By example, sediment and bacteria can be filtered upon entering the subsurface. Hydrocarbons associated with petroleum products can undergo biological degradation (Fetter, 1992, pg. 316).

B.2. Forest Comment:

Mr. Forest criticizes the "assumption" that "urbanization in the Caldwell area will result in greater magnitudes of runoff volume and increased peak discharge" and that these "assumptions are not based upon defensible analysis to support those conclusions."³

Petrich Response:

First, Mr. Forest's restatement of my "assumption" is not accurate. In entirety, the conclusion referenced by Mr. Forest reads as follows:

Urbanization typically results in greater amounts of impervious surfaces than agricultural lands. Increased amounts of impervious surfaces change the magnitude and timing of surface water runoff.
Absent stormwater retention or detention, runoff from urban areas

² Response to Expert Disclosures, Mark Forest, August 10, 2009, pg 10.

³ Response to Expert Disclosures, Mark Forest, August 10, 2009, Bullet No. 1, pg.24.

has greater magnitude and shorter lag time compared to non-urban runoff⁴ (*emphasis added*).

Second, Mr. Forest uses the curve number method using spatial and temporal averages for estimating runoff volume to conclude that post-development runoff may be lower than pre-development conditions. Mr. Ewbank rebuts this analysis in his rebuttal report⁵.

The reason for a post-development runoff increase (absent effective retention/detention) has been well established: "As land urbanizes, it is covered by impervious surfaces such as paved roads, parking lots, and roofs which prevent rainfall or snowmelt from infiltrating into the ground" (Urbonas and Roesner, 1993, pg. 28.1). Increased impervious areas directly or indirectly connected to a surface-water discharge point have virtually no infiltration capacity (and therefore have corresponding high curve-number values), resulting in more immediate runoff from a precipitation event.

Furthermore, stormwater runoff in urban areas

"has a higher velocity than in nonurban areas because impervious surfaces are smoother than meadow, range land, forest, or farm fields. This increase in velocity, along with the increase in runoff volume and the concentration of the runoff into pipes and channels, results in quicker concentration of flows from various parts of the watershed. The end result is an increase in the observed peak rate of flow as an area urbanizes" (Urbonas and Roesner, 1993, pg. 28.2-28.3).

I agree with Mr. Forest that increased peak discharge rates can be mitigated by *effective* retention/detention. The City of Caldwell's stormwater management manual (City of Caldwell, 2006) contains provisions for detention facilities. The manual mentions retention facilities, but retention facilities are "strongly discouraged" in the manual (City of Caldwell, 2006, pg. 24). From a hydrologic perspective, it is reasonable to expect that the District (as recipient of stormwater discharge) would have authority to ensure that (1) retention facilities are properly designed and constructed, (2) discharge from detention facilities (if authorized by the District) is directed to a portion of the Pioneer Irrigation District system having the capacity to accept the stormwater inflow, (3) inflows have acceptable water quality, (4) the District has the ability to limit inflows during maintenance periods, and (5) the retention/detention systems are properly maintained to ensure long-term effectiveness.

⁴ Pioneer Irrigation District Hydrology, Christian Petrich, July 7, 2009, pg. ii, Conclusion 5.

⁵ Rebuttal Analysis of Stormwater Runoff Characteristics and Responses to Expert Witness Disclosures, Herrera Environmental Consultants, pgs. 5-8.

B.3. Forest Comment:

Mr. Forest comments that one purpose of the drains was to "accept drainage from adjoining agricultural lands" and that these "drains would have historically received stormwater flows from those lands also."⁶

Petrich Response:

Mr. Forest appears to infer that drains should receive direct stormwater runoff from urbanized lands because the drains have historically received direct stormwater runoff from the same lands under pre-development conditions. This argument ignores the reality that agricultural lands are able to accept at least some infiltration under most conditions, resulting in a lower peak discharge compared to impervious surfaces such as roads and parking lots in urban areas. Furthermore, as stated above, urban impervious surfaces (such as roads and parking lots) are smoother than typical pre-development surfaces, resulting in a higher runoff velocity than typical pre-development surfaces such as farm fields (Urbonas and Roesner, 1993, pg. 28.2-28.3). Thus, agricultural fields would typically lead to a slower concentration of flows than those from impervious urban areas, resulting in a smaller peak runoff rate compared to impervious urban surfaces.

B.4. Forest Comment:

Mr. Forest suggests that there is a "potential negative impact of increasing recharge of the groundwater with the construction of detention/retention basins."⁷

Petrich Response:

The precise negative impact to which Mr. Forest is referring is unclear. Mr. Forest may be suggesting an adverse impact to ground water quality as a result of infiltration from retention/detention basins. If so, the opportunity to filter and adsorb contaminants in a subsurface flow system is more desirable than direct discharge into Pioneer Irrigation District's delivery and/or drain system. Alternatively, Mr. Forest may be suggesting again that infiltration is somehow contrary to the purpose of the drains. However, as stated above, the drains were designed and constructed, in part, to enable shallow ground water discharge. Discharge to drains of ground water originating as retention/detention infiltration is completely consistent with the intent, purpose, and function of drains.

⁶ Response to Expert Disclosures, Mark Forest, August 10, 2009, pg. 24, Bullets 2 and 3.

⁷ Response to Expert Disclosures, Mark Forest, August 10, 2009, pg. 24, Bullet 4.

B.5. Forest Comment:

Mr. Forest comments that the Petrich report⁸ does not "address the potential impact on uses of drain water if those flows are reduced over existing conditions by development practices."

Petrich Response:

I concur with Mr. Forest that the my report did not address the potential impact on uses of Pioneer Irrigation District drain water if those flows are reduced over existing conditions as a result of development. That issue is not material to Pioneer Irrigation District's complaint.

B.6. Forest Comment:

Figure 12 in my expert report⁹ compares generalized runoff patterns from land with urbanized conditions versus land with "natural conditions". Mr. Forest contends that my report provided insufficient information to infer similarities between "natural conditions" and agricultural land uses.

Petrich Response:

The fundamental difference in discharge peak and lag time after urbanization versus pre-urbanization discharge is that pervious surfaces that once accepted infiltration – whether agricultural surfaces or "natural surfaces" – have been covered with an impervious surface. Covering a portion of a large, previously pervious surface with an impervious surface typically results in a stormwater discharge peak of greater magnitude and shorter duration. This is a general, well-accepted hydrologic concept. A sophisticated supporting analysis is not necessary.

Mr. Forest seems to infer that runoff from land with agricultural uses is substantially different from land with "natural" uses. He appears to suggest that the relative differences between pre-and post- development discharge such as those shown in Figure 12 of my report do not apply in the Caldwell area. His inference may be based on his assertion that "runoff volumes after development of a residential development that is similar to Delaware Park Subdivision would *decrease* relative to pre-development conditions"¹⁰ (*emphasis added*).

However, the City of Caldwell in its stormwater management manual clearly has accepted the general hydrologic concept that development leads to greater peak discharge rates than undeveloped land:

⁸ *Pioneer Irrigation District Hydrology, Christian Petrich, July 7, 2009.*

⁹ *Pioneer Irrigation District Hydrology, Christian Petrich, July 7, 2009, pg. 26.*

¹⁰ *Response to Expert Disclosures, Mark Forest, August 10, 2009, pg 17.*

"As land is developed, the surfaces are graded and covered with non-porous materials. The reduced interception and depression storage causes the amount and rate of runoff from (sic) developed area to be greater than from (sic) undeveloped area. During rainfall events, the runoff may move more quickly through the drainage system due to unnatural routing of the flows and increased flow rates. Minor or major flooding may result." (City of Caldwell, 2006, pg. 7)

Increased peak stormwater discharge following urbanization is one of the reasons for retention/detention facilities. Properly designed, constructed, and maintained retention facilities (Figure 1) enable infiltration of stormwater discharge. Properly designed, constructed, and maintained detention systems store stormwater discharge in excess of pre-development discharge (Figure 2) for subsequent infiltration and/or controlled release.

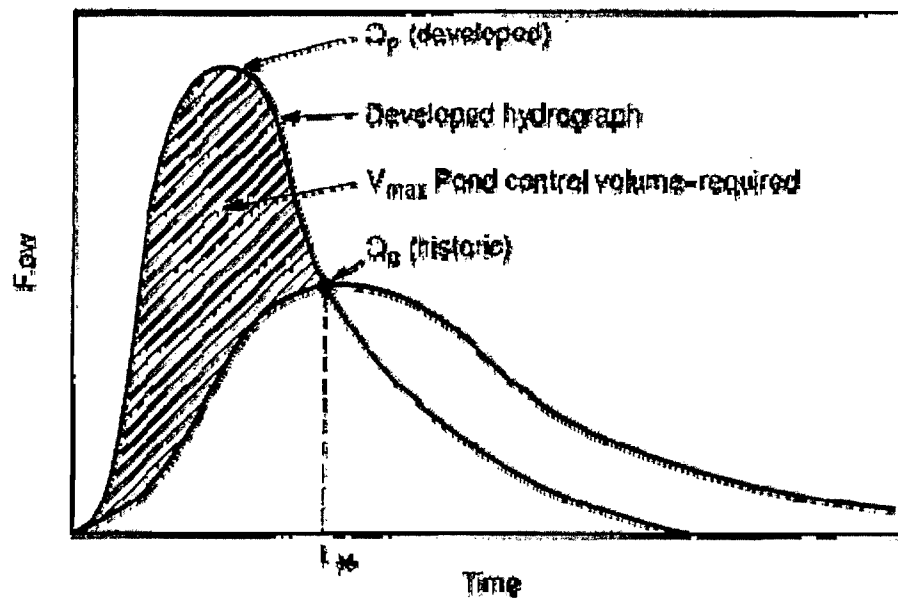


Figure 1. Illustration of detention storage volume (Urbonas and Roesner, 1993, pg. 28-26).

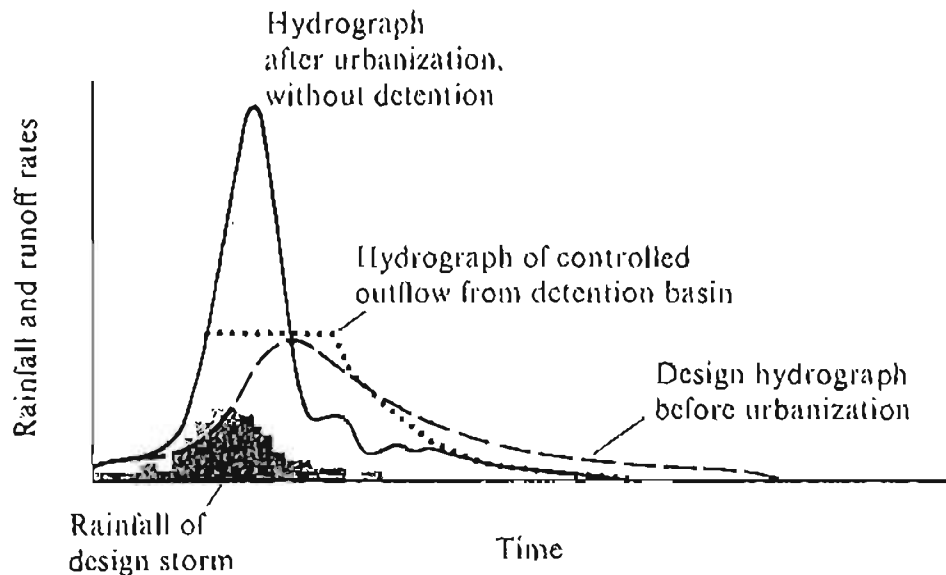


Figure 2. Illustration of conceptualized storage requirements for a detention basin designed to keep flood peaks from an urbanizing catchment at rural levels (from Dunne and Leopold, 1978, pg 419).

Drainage review (for the purposes of runoff quantity) would not be necessary in the Caldwell area if Mr. Forest were correct in his assertion that "runoff volumes after development of a residential development that is similar to Delaware Park Subdivision would decrease relative to pre-development conditions"¹¹ (and if the Delaware Park subdivision reflects conditions in other existing or anticipated Caldwell subdivisions). However, the City requires drainage review so that "downstream drainage systems and water quality not be adversely affected by upstream development (City of Caldwell, 2006, pg. 7).

B.7. Forest Comment:

Mr. Forest contends that not all impervious areas within developments are directly connected to a surface-water drainage system, and that runoff from some impervious surfaces drains to areas with lower runoff potential (e.g., lawns). Mr. Forest suggests that such drainage to pervious areas (e.g., lawns) balances the effects of direct stormwater drainage from impervious surfaces (e.g., roads) to Pioneer Irrigation District's drain system.

¹¹ Response to Expert Disclosures, Mark Forest, August 10, 2009, pg. 17.

Petrich Response:

I agree with Mr. Forest that water from some impervious surfaces drains to and, under some conditions, infiltrates into the subsurface underlying pervious surfaces. However, based on Mr. Ewbank's analysis,¹² "site runoff volume can be expected to increase in a typical residential development in Caldwell, where crop land is converted to residential land use."¹³ Mr. Ewbank's calculations show even greater runoff volumes from commercial areas, which typically have greater amounts of impervious surfaces. Thus, recognizing "the amount and rate of runoff from (sic) developed area to be greater than from (sic) undeveloped area" (City of Caldwell, 2006, pg. 7), a primary objective of the City of Caldwell's Municipal Stormwater Management Manual (City of Caldwell, 2006, pg. 7) is to "Mitigate downstream impacts from storm water flows resulting from land development activities." (City of Caldwell, 2006, pg. 6).

B.8. Forest Comment:

Mr. Forest comments that infiltration of precipitation events is controlled by the upper two horizons of the soil profile and that the Petrich Report does not demonstrate that ground water levels were ever high enough to impact infiltration of precipitation in upper soil horizons.

Petrich Response:

First, Mr. Forest provides no supporting data that infiltration of precipitation from storm events is controlled *only* by the upper two horizons of the soil profile. Second, several historical references (as noted in the Petrich report) refer to "waterlogged land" incapable of supporting agricultural activities (e.g., Iakisch, 1931; Nace et al., 1957; Paul, 1916) during all or parts of the agricultural growing season. Although the precise depths of waterlogging were not defined in these reports, waterlogging that interferes with plant growth suggests saturation or near saturation in at least the subsoil layer. Saturation or near saturation in the subsoil could limit the rate of infiltration from a precipitation event, especially a prolonged event. Third, drains have effectively lowered ground water levels in the Pioneer Irrigation District area and have thereby alleviated historical waterlogged land conditions. This has increased the ability of pervious land in the Pioneer Irrigation District area to accommodate stormwater infiltration.

¹² *Rebuttal Analysis of Stormwater Runoff Characteristics & Responses to Expert Witness Disclosures*, Herrera Environmental Consultants, August 24, 2009, pgs. 5-7.

¹³ *Ibid*, pg. 7.

C. RESPONSE TO COMMENTS BY JOHN KORENY

Mr. Koreny has provided an expert report in this matter¹⁴, and, in particular, has commented on two opinions in my expert report¹⁵. The following rebuttal addresses Mr. Koreny's comments.

C.1. Koreny Comment:

Mr. Koreny contends stormwater discharges from residential urban developments in the Caldwell area have, and will continue to have, less peak runoff than undeveloped agricultural lands. Mr. Koreny takes issue with my statement that "absent stormwater retention or detention, runoff from urban areas has greater magnitude and shorter lag time compared to non-urban runoff¹⁶ and comments that I neglected to acknowledge that the "Caldwell stormwater manual does require retention/detention facilities."¹⁷

Petrich Rebuttal:

Mr. Koreny is correct in that the City of Caldwell stormwater management manual contains provisions for the construction of detention facilities. The manual mentions retention facilities, but the City strongly discourages retention facilities (City of Caldwell, 2006, pg. 24).

However, the Pioneer Irrigation District is concerned that (1) existing stormwater detention facilities have failed, (2) there are deficiencies in the City's review process for stormwater facilities, and (3) the City does not have a mechanism for ensuring proper maintenance and operation of these facilities into the future.¹⁸ Mr. Will Mason provided documentation illustrating failed retention/detention systems.¹⁹ Thus, my opinion stands: absent effective or operational retention or detention facilities (or other means of increasing infiltration), direct stormwater discharge peaks from urban areas will have a greater magnitude compared to non-urban runoff.

C.2. Koreny Comment:

In my expert report, I stated that many canals operate at full capacity and have little freeboard for additional flows. Mr. Koreny argues that, based on data from the Idaho Department of Water Resources (IDWR) Water District 63 Water Accounting Database, flows in the Pioneer Irrigation District system are below

¹⁴ Expert Report, John S. Koreny, August 10, 2009

¹⁵ Pioneer Irrigation District Hydrology, Christian R. Petrich, July 7, 2009.

¹⁶ Pioneer Irrigation District Hydrology, Christian R. Petrich, July 7, 2009., pg. 9.

¹⁷ Expert Report, John S. Koreny, August 10, 2009, pg 2.

¹⁸ Rebuttal Disclosure Information, William J. Mason, August 24, 2009.

¹⁹ Ibid.

capacity, and that, by inference, Pioneer Irrigation District channels are capable of receiving additional stormwater discharge.

Petrich Rebuttal:

Flows in individual canals and laterals depend on several factors, including initial diversions from the Boise River, additional flows from drains, diversions from the canals and laterals by the District's water users, etc. My statement regarding the levels at which canals operate was a general comment based on discussions with District personnel²⁰ and on visits to the District area. In my visits, I did not observe water levels that would lead me to doubt the District's assertions.

Mr. Koreny shows daily diversions from the Boise River into the Phyllis Canal and argues that the canal system is not operating at peak capacity. Unfortunately, Mr. Koreny's diversion data do not include inflows into the Pioneer Irrigation District system from other sources, such as additional diversions from the Boise River; diversions from Five Mile Drain, Indian Creek, Elijah Drain, Wilson Drain; and diversions from local wells. As such, Mr. Koreny's assessment is incomplete.

D. RESPONSE TO COMMENTS BY MICHAEL MURRAY

Dr. Michael Murray responded to Pioneer Irrigation District's expert witness disclosures on August 10, 2009. The following is a response to selected comments of Dr. Murray.

D.1. Murray Comment:

Dr. Murray states that "a portion of Treasure Valley agriculture has converted to spray irrigation systems, resulting in greater water efficiency" and that "canals, laterals, and ditches of the Pioneer Irrigation District should have available conveyance capacity based on area-wide conversion from flood irrigation to spray irrigation and land use changes from agriculture to residential."²¹

Petrich Rebuttal:

Dr. Murray argues that there should be more capacity in the Pioneer Irrigation District system because of conversions of "many fields" to sprinkler irrigation systems. However, he provides no data quantifying the agricultural acreage that has been converted from gravity to sprinkler irrigation systems. In fact,

²⁰ Jeff Scott, Pioneer Irrigation District, personal communication.

²¹ Untitled report, Michael Murray, August 10, 2009, pg.4.

District personnel indicate few agricultural fields within the District have been converted to sprinkler irrigation²².

While portions of the District have been converted to pressurized irrigation systems for residential areas, Dr. Murray provides no data describing the effects of these conversions on delivery requirements. In fact, the majority of residential irrigation systems are designed as flow-through systems. With fluctuating pumping demands typical of residential irrigation, Pioneer Irrigation District must still convey sufficient constant flow for peak residential irrigation pumping demand. Thus, while sprinkler irrigation systems may be more efficient than gravity irrigation on a per irrigated acre basis, residential pressurized irrigation systems supplied from flow-through surface water delivery systems are generally less efficient overall than agricultural sprinkler irrigation systems. As a result, District personnel report that delivery requirements often increase in residential areas served by pressurized irrigation supplied by flow-through surface water systems.²³ Thus, there is no reason to believe that historical delivery requirements have changed appreciably.

E. RESPONSE TO COMMENTS BY JACK HARRISON

Dr. Jack Harrison responded to Pioneer Irrigation District's expert witness disclosures on August 10, 2009. The following is a response to a selected comment of Dr. Harrison.

E.1. Harrison Comment:

Dr. Harrison suggests that "it seems apparent that trying to discharge all storm water from 100-yr storms into the shallow groundwater could create significant concerns with localized flooding."²⁴

Petrich Rebuttal:

Dr. Harrison's comment is unclear. If a retention facility is designed and constructed to accommodate runoff from a 100-year storm, then it is unclear how local flooding would result in the vicinity of the retention facility.

A properly designed and constructed retention facility will allow stormwater infiltration over a period of time. Infiltrated water enters and flows through the shallow aquifers system, ultimately discharging to drains or other surface channels. As stated earlier, the Pioneer Irrigation District drains effectively collect shallow ground water discharge. As a result, shallow ground water

²² Jeff Scott, Pioneer Irrigation District, personal communication.

²³ Ibid.

²⁴ Lower Boise River Water Quality and Caldwell Storm Water Quality Management, Jack Harrison, August 10, 2009

levels in the Pioneer Irrigation District area have remained relatively constant over recent decades. Absent the drains, local flooding would be much more likely.

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

**AFFIDAVIT OF R. SCOTT STANFIELD IN
SUPPORT OF PIONEER IRRIGATION
DISTRICT'S RESPONSE IN OPPOSITION TO
CITY OF CALDWELL'S RENEWED MOTION
TO DISMISS FOR FAILURE TO JOIN**

STATE OF IDAHO)
) ss.
County of Canyon)

R. Scott Stanfield, having been duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18 years, and make this affidavit based upon my personal knowledge.

2. I am a principal in the Caldwell, Idaho-based engineering and design services firm of Mason Stanfield. I was the chief design engineer of the Montecito Park No. 1 subdivision located in Caldwell, Idaho. The subdivision was developed by Hubble Homes. Among the improvements designed and constructed as part of the subdivision were two urban stormwater outfalls which drain a city street known as Aviation Way, and discharge into Pioneer Irrigation District's "A" Drain. For purposes of this litigation, Pioneer has identified those urban stormwater drainage outfalls as "A-15" and "A-17."

3. Outfalls A-15 and A-17 were not part of the original design of the Montecito Park No. 1 subdivision. Given my work experience in and around Caldwell, Idaho, I am familiar with Pioneer Irrigation District's zero discharge urban stormwater policy (*i.e.*, Pioneer does not accept and will not approve urban improvement designs which include the routing and discharge of urban stormwater into any of its facilities). Pioneer's zero discharge policy was one of the reasons I did not include outfalls A-15 and A-17 in my original design of the subdivision.

4. There were other reasons in addition to Pioneer's zero discharge urban stormwater policy why outfalls A-15 and A-17 were not included in my original design of the Montecito Park No. 1 Subdivision. First, outfalls A-15 and A-17 only drain urban stormwater

collected from catch basins located on Aviation Way. Consequently, outfalls A-15 and A-17 do not provide any stormwater drainage benefit to the Montecito Park No. 1 subdivision whatsoever. Second, and as I also explained to City of Caldwell engineers, outfalls A-15 and A-17 (and their direct-piped discharge to Pioneer's "A" Drain) were not necessary for urban stormwater drainage purposes. The direct discharge of urban stormwater from Aviation Way into the "A" Drain was not necessary because during a large storm event, the grading of Aviation Way would direct stormwater sheet flows off of the street and onto an adjacent grass landscape strip lying between the street and the "A" Drain. The grass landscape strip provides an infiltration buffer between Aviation Way and the "A" Drain. Any remaining stormwater sheet flows draining off of Aviation Way not absorbed or infiltrated through the grass landscape buffer would then diffusely flow into the "A" Drain.

5. Despite my expression of the foregoing concerns and explanation, the City of Caldwell's engineering department required the design and installation of the outfalls known as A-15 and A-17. My design and the eventual construction of outfalls A-15 and A-17 were done only because of the requirements of Caldwell engineering officials. The outfalls would not have been designed or constructed but for Caldwell's requirements, particularly because of: (1) Pioneer's zero discharge urban stormwater policy, (2) the fact that the outfalls themselves were not necessary for drainage purposes, and (3) because the Montecito Park No. 1 subdivision derives absolutely no benefit from the outfalls. In sum, the City of Caldwell, via the drainage of Aviation Way, is the only entity benefiting from outfalls A-15 and A-17.

Further your affiant sayeth naught.



R. Scott Stanfield

SUBSCRIBED AND SWORN to before me this 20th day of August, 2009.



Jordan Hurd.

NOTARY PUBLIC FOR IDAHO

Residing at 2008 Wildflower Drive Nampa Id

My Commission Expires Sept. 23, 2014

CERTIFICATE OF SERVICE

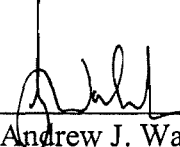
I HEREBY CERTIFY that on this 11th day of September, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF R. SCOTT STANFIELD IN SUPPORT OF PIONEER IRRIGATION DISTRICT'S RESPONSE IN OPPOSITION TO CITY OF CALDWELL'S RENEWED MOTION TO DISMISS FOR FAILURE TO JOIN** to be served by the method indicated below, and addressed to the following:

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A.M. 4:05 P.M.

SEP 15 2009

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
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PIONEER IRRIGATION DISTRICT,

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CITY OF CALDWELL,

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PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

**PIONEER'S RESPONSE BRIEF IN
OPPOSITION TO CITY OF CALDWELL'S
SECOND MOTION FOR SUMMARY
JUDGMENT**

TABLE OF CONTENTS

I. Introduction	1
II. The City Makes Many Misrepresentations In Its “Factual Background”	5
A. The City Misrepresents Deposition Testimony Regarding Drainage Rights And Responsibilities	5
B. Pioneer Has Produced Evidence Of Its Ownership Of Express Easements And Rights-Of-Way To Its Facilities.....	6
C. Neither Pioneer Nor Its Counsel Requested Removal Of The Written Authorization Requirement	7
D. While Only Five Outfalls Are Currently Identified For Removal, That Issue Must Be Re-Evaluated Given The City’s Woefully Late Disclosure Of Critical Stormwater Outfall Maps.....	9
III. Legal Discussion	10
A. A Blanket Holding That The Manual Is “Valid” Is Inappropriate Because Many Aspects Of The Manual Violate State Law.....	10
B. There Are Disputed Issues Of Material Fact Regarding Pioneer’s Claims For Nuisance, Trespass, Section 42-1209, and Injunction To Be Resolved At Trial.....	15
1. All Five Outfalls Are Subject To Potential Removal.....	15
2. There Is Ample Record Evidence Of Interference With The Operation, Use, And Enjoyment Of Pioneer’s Irrigation Easements, Rights-Of-Way, And Facilities	18
3. Injunction Is A Remedial Measure That Should Not Be Addressed Until Trial	21
C. Under Idaho Law, Pioneer Has Exclusive Possession To Its Primary Easements, Which Is Sufficient To Support Its Trespass Claim.....	24
1. The Idaho Supreme Court Has Specifically Stated that Irrigation Easements and Rights-of-Way Are “Exclusive”	25
2. The Idaho Legislature Has Provided Irrigation Districts With Exclusive Rights Of Possession In Their Facilities	28
3. The City’s Argument That Other Discharges Are Present In Pioneer’s Facilities Fails Because The City Confuses Factual Exclusivity With Legal Exclusivity.....	29

D.	The “Exhaustion” Doctrine Does Not Bar Any Of Pioneer’s Independent Claims For Relief	30
----	---	----

IV.	Conclusion	35
-----	------------------	----

TABLE OF CASES AND AUTHORITIES

	Page
Cases	
<i>Arnzen v. State</i> , 123 Idaho 899	34
<i>Burt v. Farmers' Co-op. Irr. Co.</i> , 30 Idaho 752	25
<i>Canyon View Irr. Co. v. Twin Falls Canal Co.</i> , 101 Idaho 604	26
<i>Coulsen v. Aberdeen-Springfield Canal Co.</i> , 47 Idaho 619	25
<i>Hale v. McCammon Ditch Co.</i> , 72 Idaho 478	25
<i>Johnson v. Twin Falls Canal Co.</i> , 66 Idaho 660	23
<i>Legg v. Barinaga</i> , 92 Idaho 225	23
<i>Mock v. Potlatch Corp.</i> , 786 F.Supp. 1545	18
<i>Pioneer Irr. Dist. v. Smith</i> , 48 Idaho 734	25
<i>Reynolds Irr. Dist. v. Sproat</i> , 69 Idaho 315	25
<i>Seventeen, Inc. v. Pilot Life Ins. Co.</i> , 205 S.E.2d 648	22
<i>Shoshone-Paiute Tribe v. U.S.</i> , 889 F.Supp. 1297	22
<i>The Highlands, Inc. v. Hosac</i> , 130 Idaho 67	22
<i>Weinberger v. Romero-Barcelo</i> , 456 U.S. 305	22

<i>White v. Bannock County Comm'rs</i> , 139 Idaho 396	30
---	----

Statutes

IDAHO CODE § 42-1102.....	6, 23, 28, 31
IDAHO CODE § 42-1107.....	28
IDAHO CODE § 42-1208.....	23, 25, 28
IDAHO CODE § 42-1209.....	3, 7, 10, 12, 13, 15, 18, 23, 25, 28, 31, 32
IDAHO CODE § 42-2931.....	10
IDAHO CODE § 42-2947.....	10
IDAHO CODE § 42-2964.....	10
IDAHO CODE § 52-101.....	31
IDAHO CODE § 52-111.....	22
IDAHO CODE § 67-5201.....	32
IDAHO CODE § 67-5248.....	33
IDAHO CODE § 67-5271.....	30
IDAHO CODE § 67-5273.....	32, 33
IDAHO RULE OF CIVIL PROCEDURE 10.....	32
IDAHO RULE OF CIVIL PROCEDURE 3.....	32
IDAHO RULE OF CIVIL PROCEDURE 45.....	32

Other Authorities

42 AM.JUR.2D.....	22
CALDWELL CITY CODE § 13-01-03	32
CALDWELL CITY CODE § 13-01-09	32
SESSION LAW 1981, ch. 344.....	25
SESSION LAW 2004, ch. 179.....	25

I.
INTRODUCTION

Pioneer Irrigation District hereby files this response brief in opposition to the City of Caldwell's Second Motion for Summary Judgment, filed July 28, 2009. This brief is supported by affidavits of Scott Campbell, William Mason, R. Scott Stanfield, Andrew Waldera, and Mark Zirschky, filed contemporaneously herewith, as well as by affidavits and other documents already on file with this Court.

In its Second Motion for Summary Judgment, the City of Caldwell acknowledges that it is the entity responsible for managing municipal stormwater runoff within its area of impact, and that it has been provided with the necessary authority to implement a manageable stormwater plan for its residents:

Caldwell is charged with protecting the health and safety of its citizens, including protecting its citizens from flooding and other harms associated with storm water.

...

It is beyond dispute that the "[t]he drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the policy power can be exercised."

...

The Idaho statutes expressly require Caldwell to manage storm water. Those statutes allow Caldwell to alter channels of water courses that exist within Caldwell's boundaries. Caldwell is also authorized "to clear, cleanse, alter, straighten, widen, pipe, wall, fill or close any waterway, drain or sewer or any watercourse in such city when not declared, by law, to be navigable." Finally, Caldwell is "authorized to prevent the flooding of the city or to secure its drainage, to assess the cost thereof to the property benefitted, and for such purpose make any improvement or perform any labor on any stream or waterway, either within or

without the city limits, when necessary to protect the safety of life and property of the city.”

(Memorandum in Support of City of Caldwell’s Second Motion for Summary Judgment, pp. 3, 22, 24.)

This litigation was brought as a direct result of the City of Caldwell’s refusal to fulfill its statutory obligation to “protect the health and welfare of its citizens” by “preventing flooding,” “securing drainage,” “assessing costs to the property benefitted,” or “making improvements or performing labor” as necessary to manage its municipal stormwater runoff. Through the enactment of its Storm Water Management Manual and associated ordinances, the City of Caldwell is attempting to circumvent all of its statutory obligations for the management of the City’s stormwater by transplanting that responsibility squarely onto the shoulders of Pioneer and other irrigation districts unfortunate enough to possess irrigation easements and rights-of-way within the boundaries of the City.

The City of Caldwell does not wish to construct, manage or maintain any form of centralized stormwater drainage system, nor to incur any of the costs associated with any such infrastructure. Its policy for dealing with the municipal stormwater runoff within its jurisdiction is to direct its residents, developers, and city planners to cast any such waters into the nearest available irrigation facility and let the irrigation districts deal with the problem from there. The City of Caldwell has formally adopted this policy through the enactment of its Stormwater Management Manual, not only in derogation of its statutory obligation to take proactive measures to manage its own stormwater runoff, but in total disregard of the property rights of the owners of the irrigation easements and rights-of-way affected by this policy.

In this litigation, the City of Caldwell has attempted to defend its policies through the assertion of the theory that the City and its citizens have “an historical right” to drain their

stormwater runoff into Pioneer's facilities, and that Pioneer lacks the legal right to prevent the use of its facilities by the City or any other adjoining property owner. The City contends that the combination of the exercise of its police power, coupled with the existence of alleged "historic" drainage rights, gives Pioneer no choice but to accept this water, along with all of the risks, costs, responsibilities, and liabilities associated with its management, with no further assistance or compensation from the City.

Pioneer Irrigation District initiated this litigation in order to challenge the City's stormwater policies and to protect its right to the use and enjoyment of its easements and rights-of-way. Now, the City seeks summary judgment as to all of Pioneer's claims in this matter and seeks confirmation from this Court that the City's Stormwater Manual is "valid." In essence, the City seeks a ruling from this Court that would allow the City to co-opt Pioneer's facilities for its own purposes at no cost to the City, while shifting all of the risks, liabilities, and responsibilities to Pioneer. As this brief will demonstrate, however, summary judgment is not appropriate to dismiss any of Pioneer's claims, nor is it appropriate to confirm the "validity" of the Manual.

Simply put, the "validity" of the Manual presents a material issue of fact to be resolved at trial. Fundamentally, the entire Manual is predicated upon the assumption that the City and/or landowners adjacent to Pioneer easements and rights-of-way automatically have "historic" rights to discharge into those facilities. However, the City has not proven any such "historic" rights, and it is legally inappropriate to make a blanket assumption that such "historic" rights exist, as they must be demonstrated through admission of evidentiary facts which support some valid legal theory, such as a prescriptive easement, natural servitude, or express agreement.

As this brief will explain, other objectionable provisions within the Manual include its conflict with the written permission requirement of Idaho Code Section 42-1209, and

its reliance upon the use of surface water discharges as a means of stormwater management, to the extent that discharges are essentially required. Moreover, there are material issues of fact as to the City's *application* of the Manual, aside from its express provisions. Fundamentally, these are material issues of fact to be resolved at trial. Therefore, a blanket holding that the Manual is "valid" in its entirety is not appropriate.

The City also argues that there is no evidence to support the removal of the five outfalls that have thus far been designated for potential removal in this litigation. This is simply not true. As this brief will explain, affidavits, deposition testimony, and expert witness reports demonstrate that unchecked discharges of municipal stormwater increase the risk of flooding from Pioneer's facilities; introduce degraded water quality; and significantly impair Pioneer's ability to repair and maintain its easements and rights-of-way. Therefore, there are material issues of fact regarding the removal of the five stormwater outfalls to be resolved at trial.

Moreover, as this brief will explain, the City only recently—and in an extremely untimely fashion—produced a critical map of stormwater outfalls that is highly material to this litigation. Pioneer and its expert witnesses are currently in the process of reviewing that information, which may result in the designation of additional stormwater outfalls for removal.

The City further argues that Pioneer cannot maintain its trespass claim because it does not have exclusive possession of its facilities. However, the City fails to recognize the distinction between Pioneer's *primary* easements and rights-of-way (the bed-and-banks of the facility) and Pioneer's *secondary* easements and rights-of-way (the strip of land along either side of the conveyance facility). While Pioneer does not have exclusive possession of its secondary easements, decisions of the Idaho Supreme Court and statutes enacted by the Idaho Legislature

demonstrate that Pioneer does have exclusive possession of its primary easements. Pioneer, therefore, has a sufficient property interest in its facilities to maintain a trespass claim.

The City also argues that Pioneer's claims for removal are waived because Pioneer failed to exhaust administrative remedies before the City Engineer, based upon its failure to "appeal" the City Engineer's approval of those outfalls. However, City does not establish any of the factual or legal predicates that would be required by Due Process to bar Pioneer's claims on this basis. Moreover, the City fails to recognize that Pioneer is seeking to enforce its own, independent legal rights. Therefore, there is simply no basis for concluding that Pioneer's claims in this action are barred by the exhaustion doctrine.

For these and the reasons more fully explained in this brief, this Court should deny the City's motion in its entirety.

II. THE CITY MAKES MANY MISREPRESENTATIONS IN ITS "FACTUAL BACKGROUND"

A. The City Misrepresents Deposition Testimony Regarding Drainage Rights And Responsibilities

As it did in the City of Caldwell's Response to Pioneer Irrigation District's Motion for Partial Summary Judgment of August 11, 2009, p. 8, n. 2, the City again mischaracterizes deposition testimony for the proposition that "each property owner within PID's boundaries has the historical right to drain one miners' inch per acre from its property." (City's Mem. in Supp., pp. 4, 15.) Pioneer addressed this issue in its Reply Memorandum in Support of Pioneer Irrigation District's Motion for Partial Summary Judgment of September 3, 2009, pages 25 through 27, and Pioneer hereby specifically incorporates that discussion herein.

To summarize that discussion, Pioneer's position is that its patrons are entitled to the delivery of up to one miner's inch of *irrigation* water per acre of irrigated land and, therefore, its patrons are entitled to drain up to one miner's inch of *irrigation* return flow water per acre of irrigated land, to the extent that much water is actually delivered. In other words, the drainage right is specifically tied to and derived from the delivery of irrigation water. This does not include drainage of municipal stormwater runoff, which has been collected from hardscapes. And, as Pioneer explains in its Memorandum in Support of Pioneer's Second Motion for Partial Summary Judgment of September 1, 2009, the City has produced no written agreements which alter or affect this conclusion, nor do the theories of prescriptive easement, natural servitude, or discharge to a natural watercourse support the City's position on this issue.

B. Pioneer Has Produced Evidence Of Its Ownership Of Express Easements And Rights-Of-Way To Its Facilities

According to the City:

PID does not own the land upon which the canals and drains run in fee simple. Rather, PID only possesses non-exclusive prescriptive easements as the basis for its claimed property rights....PID has provided no evidence of any property rights for its claimed facilities aside from limited testimony about its prescriptive rights and easements.

(City's Mem. in Supp., p. 4.)

The assertion by the City is wholly and unequivocally false. While Pioneer's real property interests in the majority of its facilities are in the form of statutory rights-of-way pursuant to Section 42-1102, Pioneer has also produced to the City many *express* right-of-way and easement agreements for its facilities, as well. Pioneer has already filed examples of such express agreements with this Court. (Aff. of Dawn Fowler of Sept. 3, 2009, Ex. A, pp. 6-7, Ex. B.) And, these are just examples—there are many more.

C. Neither Pioneer Nor Its Counsel Requested Removal Of The Written Authorization Requirement

One of the issues that Pioneer has raised regarding the City's Manual in this litigation is the fact that it simply requires a developer to provide "notice" to Pioneer before constructing a new discharge into a Pioneer facility. Pioneer believes this violates Section 42-1209. In response to this argument, the City argues that the Manual originally required developers to obtain Pioneer's approval, but that Pioneer requested the removal of the approval requirement. (City's Mem. in Supp., pp. 5-8.)

As an initial matter, the City does not even explain the legal relevance of this assertion in its briefing. Presumably, it does so in order to undercut Pioneer's ability to challenge that particular provision within the Manual. Regardless, the City has no support for its arguments on this issue. According to the City:

As part of the process of developing the revised Manual, Caldwell's City Engineer had a number of discussions with PID's Board Members regarding storm water discharge. During those discussions, PID notified Gordon Law, Caldwell's City Engineer at the time, that PID wanted Caldwell to eliminate the requirement that PID provide review and approval regarding proposed discharges of storm water.

(City's Mem. in Supp., p. 5.)

Critically, however, the City *does not provide any citations to the factual record* for these statements. The *only* record evidence relied upon by the City to support the assertion that Pioneer requested the removal of an "approval" requirement is (1) an exchange between counsel for the City and counsel for Pioneer at an April 17, 2006 City Council hearing, quoted on pages 6 and 7 of the City's Memorandum in Support, and (2) a memorandum from City Engineer Gordon Law stating that he had removed the approval requirement from the Manual at the request of Pioneer. (Randolph Aff., Ex. F, Bates No. EPID020750.)

In fact, the City's unsupported assertions on this issue directly conflict with deposition testimony by Naida Kelleher, Pioneer's former Secretary, and Alan Newbill, one of Pioneer's current directors. Mr. Newbill attended the City Council meeting in question, and disagrees with the City's characterization that Pioneer was requesting removal of a written approval requirement. (Campbell Aff., ¶ 2, Ex. A (Newbill Dep.), 144:10-145:6, 148:7-150:1.) Similarly, when testifying regarding a previous meeting between City and Pioneer representatives that she attended, Ms. Kelleher did not recall the Pioneer representatives requesting the removal of a written approval requirement from the Manual. (Campbell Aff., ¶ 3, Ex. B (Kelleher Dep.) 163:15-164:19.) This deposition testimony certainly creates a material issue of fact on this issue, particularly given the City's very weak support for the proposition that Pioneer requested removal of a provision requiring approval of stormwater outfalls in its easements and rights-of-way.

With respect to the exchange between counsel for Pioneer and the City at the City Council hearing, at most, that is an ambiguous exchange. There is certainly no express request to remove the approval requirement from the Manual.¹ And, a clear depiction of Pioneer's position at that hearing is provided by the written comments that counsel for Pioneer presented to City Council at that hearing. (Waldera Aff., ¶ 3, Ex. A, Bates No. PID044523.) There is no request in that document for the removal of a written approval requirement.

And, with respect to Gordon Law's memo of April 12, 2006 that is referenced on page 5 of the City's Memorandum in Support, that document was generated by the City—*not* by

¹ In this regard, the City's reliance upon the *minutes* of that hearing is totally unjustified. (City's Mem. in Supp., p. 7.) As a matter of pure logic, a very terse and conclusory set of meeting minutes cannot clarify or inform what was actually said at a hearing for which an actual transcript exists, nor can it clarify or inform written comments that were actually submitted.

Pioneer. Therefore, that memo is a wholly unreliable depiction of anything allegedly communicated by representatives of Pioneer. The bottom line is that the City in its brief has not cited to any record evidence specifically demonstrating that Pioneer requested removal of the approval requirement.

D. While Only Five Outfalls Are Currently Identified For Removal, That Issue Must Be Re-Evaluated Given The City's Woefully Late Disclosure Of Critical Stormwater Outfall Maps

The City notes that, thus far, Pioneer has identified five particular outfalls for removal in this litigation. (City's Mem. in Supp., p. 10.) However, recent developments could significantly increase the number of outfalls identified for removal. This issue has already been explained to this Court in the Affidavit of Andrew J. Waldera of September 3, 2009.

As documented in that affidavit, Pioneer's first set of discovery requests to the City requested production of maps, drawings, and other documents depicting the City's stormwater collection and drainage system. On September 2, 2009—approximately 560 days after that request, and only after the issue came up during recent depositions—the City produced a copy of its “Storm Drain Map Book (2008),” consisting of approximately 214 pages of maps visually depicting the storm drainage system within the City and its area of impact.

Pioneer's expert witnesses are currently in the process of evaluating this information. Given the recent—and woefully late—disclosure of these maps, which are highly relevant and material to this action, Pioneer may be required to identify additional outfalls for removal in this litigation.

III. LEGAL DISCUSSION

A. A Blanket Holding That The Manual Is “Valid” Is Inappropriate Because Many Aspects Of The Manual Violate State Law

The City requests a blanket holding that its stormwater Manual is valid under Idaho law. (City’s Mem. in Supp., p. 21.) The City relies nearly exclusively upon *general* grants of municipal authority for this proposition. (City’s Mem. in Supp., pp. 21-27.) Pioneer has already specifically addressed this issue in its own summary judgment briefing, and specifically incorporates those discussions herein. (Pioneer’s Mem. in Supp. of July 10, 2009, pp. 20-27, 34-38.) To summarize those discussions, long confirmed rules of statutory construction establish that, to the extent there is a conflict between the Manual and Section 42-1209, Section 42-1209 is controlling. This is because the Manual is simply an ordinance and must therefore yield to a statute such as Section 42-1209, and because Section 42-1209 is a much more specific and recent statute, and is therefore controlling over older, general grants of municipal authority.²

² The only statutes discussed by the City that have not already been addressed in Pioneer’s own summary judgment briefs are the drainage district statutes in Title 42, Chapter 29 of the Idaho Code. Pioneer did not address those statutes, because the City does not rely upon them in its Answer & Counterclaim. In fact, this is the first time City has discussed those statutes. Regardless, those statutes are subject to the same analysis and conclusion that Pioneer has already presented as to other municipal statutes: at most for the City, they are general grants of authority that must yield to the requirements of the more specific Section 42-1209. These statutes, at most, provide the City with authority to take measures that would “improve” and “preserv[e]” Pioneer’s drains. IDAHO CODE §§ 42-2947, 42-2931, 42-2964. The City’s construction, ownership, and/or approval of unauthorized stormwater outfalls into Pioneer’s facilities certainly do not qualify as “improving” or “preserving” those facilities. To the contrary, the City is seeking to use Pioneer’s irrigation drains for its own drainage purposes, without paying any compensation to Pioneer, while simultaneously shifting all of the risk, responsibility, and liability to Pioneer. There is nothing in the drainage district statutes cited by City that authorize such action.

Pioneer does not challenge the City's general authority to regulate stormwater drainage systems, and a holding that the City has general authority to adopt an ordinance regulating stormwater will not advance any issues in this litigation. Rather, there are certain specific provisions of the Manual that *do* violate state law, and those provisions should not be confirmed as "valid" by this Court.

In its Counterclaim, the City specifically requests a holding that, "the Manual is a legitimate exercise of Caldwell's legal authority *and its terms and provisions are binding upon PID.*" (City's Ans. & Countercl., pp. 15, 17 (emphasis added).) Therefore, it is critical in this litigation for Pioneer to explain why aspects of the Manual violate state law, and to prevent a blanket holding by this Court that the entire Manual is "valid."

Fundamentally, many provisions in the Manual are based upon the false premise that the City and/or adjacent landowners automatically have blanket "historic" rights to discharge into Pioneer's facilities. For example, the Manual requires a stormwater retention facility associated with property that, according to City, has "established historical drainage rights," to include an overflow drainage line that discharges to "a point of historical discharge." Manual § 103.6.4. Similarly, according to the Manual, if a "historical right to drain exists," then permission is not required in order to construct an emergency overflow line into a Pioneer facility. *See* Manual § 103.7.5.

However, as this response brief and Pioneer's Second Motion for Partial Summary Judgment have already explained, the fact that some sheet flow and agricultural return flow may have historically been discharged to Pioneer facilities, does not provide the City or the adjacent landowner with the right to discharge municipal stormwater runoff. Again, there are very strict requirements and restrictions upon the application of natural servitudes and

prescriptive easements to drainage rights. It is therefore wholly inappropriate for the Manual to make a blanket assumption that “historical” drainage rights into Pioneer’s facilities exist. Yet that is precisely what the Manual does.

Another provision in the Manual that, according to the City, is “binding upon PID,” is the provision stating that a developer need only provide Pioneer with notice of a new outfall into its facilities. Manual § 101.1.5. (As this brief has already explained, neither Pioneer nor its counsel ever specifically requested the revision of this provision.) Notably, this mere notice provision is in stark contrast to stormwater manuals adopted by the Cities of Boise and Nampa, which **require** permission of the irrigation entity. (See Pioneer’s Expert Witness Disclosure of 07/10/09, Ex. B., p. 6.)

In order to deflect attention from this obvious inconsistency with Section 42-1209, the City notes that “the Manual does not prohibit a developer from obtaining written permission from PID.” (City’s Mem. in Supp., p. 27.)³ That may be true, but the fact remains that the notice provision is a provision which is inconsistent with Idaho law, that the City seeks to have confirmed as “binding upon PID.”

Similarly, the City explains that, “the Manual requires that the developers seek permission from PID ***if the calculated drainage area would result in increased discharge.***” (City’s Mem. in Supp., p. 36 (emphasis added).) The problem with this argument is that it contradicts Section 42-1209, which requires written permission for ***any and all*** encroachments into irrigation district facilities—not just those that the City or a developer independently

³ The City also asserts that, “PID wrongly asserts that the Manual prohibits a developer from obtaining written permission from PID for a discharge into PID’s facilities.” Pioneer is not aware of ever having claimed that the Manual actually ***prohibits*** a developer from seeking approval. The City does not provide a citation to any document filed by Pioneer which makes such a claim.

determine would result in an “increased discharge.” Pioneer specifically makes this point in its own summary judgment materials, (Pioneer’s Mem. in Supp. of 07/10/09, pp. 15-17), and Judge Wilper confirmed this point in his order in the *ACHD v. Settlers* case. Wilper Order, p. 11.⁴

The Manual’s disregard of Section 42-1209 is also reflected in its “Downstream Rule,” which states that, “[i]t is the *developer’s responsibility*” to ensure the quality of new discharges and that new discharges not exceed “a development’s ‘reasonable’ share of downstream system capacity.” Manual § 101.1.2 (emphasis added). This provision ignores that it is the owner of the irrigation facility receiving these proposed discharges that should determine the downstream system capacity to accept new discharges. Indeed, Gordon Law, the City’s Engineer, specifically stated during his deposition the City’s position that it is the *City—not Pioneer*—that has the authority to determine if a particular stormwater outfall increases discharge quantities into or otherwise interferes with the operation of *Pioneer’s own facilities*. (Campbell Aff., ¶ 4, Ex. C (Law Dep.), 125:4-18, 131:19-132:3.)

Another objectionable aspect of the Manual is its well-documented, extreme reliance upon the use of discharging detention facilities, to the exclusion of other non-discharging alternatives.⁵ According to Pioneer’s expert witness P. Steven Porter, P.E., Ph.D.:

⁴ This order was attached as Exhibit A to the affidavit of Dylan B. Lawrence, filed with this Court on July 10, 2009.

⁵ This extreme reliance upon facilities that discharge to Pioneer facilities to the exclusion of non-discharging options is emphasized by the experience of R. Scott Stanfield, an engineer with experience designing developments in the Caldwell area. According to Mr. Stanfield, he originally included retention facilities in the design for the Windsor Creek Subdivision. (Affidavit of R. Scott Stanfield of 09/15/09, ¶ 5.) However, the City would not approve those plans. *Id.* When Mr. Stanfield met with City Engineer Gordon Law to discuss the project, “Mr. Law suggested a potential solution for the apparent impasse—the presentation of one set of design plans to Pioneer showing no or zero municipal stormwater discharge to its facilities, and the presentation of a different set of plans to City providing for the discharge of the municipal stormwater generated by the development to Pioneer’s facilities.” *Id.* On subsequent projects,

Overall, detention facilities have poor performance when it comes to dissolved contaminants and indicator organisms. The IDEQ gives dry extended detention facilities their lowest rating (<25% removal) for bacteria removal (IDEQ, 2005). EPA believes that detention facilities remove fewer than 30% of bacteria (EPA, 1999).

(Pioneer's Expert Witness Disclosure of 07/10/09, Ex. G, § V.)

And, according to Pioneer's expert witness Mark Ewbank, P.E., there are steps the City could take to improve the performance of stormwater retention and infiltration facilities, such as proper sizing and more effective long-term maintenance. (Pioneer's Expert Witness Disclosure of 07/10/09, Ex. B, pp. 10-12.) Moreover, according to Ewbank:

There is increasing evidence that [Low Impact Development storm water management principles] can be much more effective at preventing adverse water quality and quantity effects of urban storm water runoff compared to conventional storm water management facilities.

(Pioneer's Expert Witness Disclosure of 07/10/09, Ex. B, pp. 12-13.)

There are other objectionable aspects about the Manual, including issues related to the City's actual *application* of the Manual. As an example, the City attempts to salvage the Manual's validity by noting that it requires there to be sufficient downstream capacity to handle new discharges. (City's Mem. in Supp., p. 29.) However, Pioneer's expert witness Mark Ewbank, P.E. found:

Review of numerous drainage reports submitted to the City for development projects in recent years indicates that such proof of downstream capacity is not being provided, nor being requested by

City employees continued to require that Mr. Stanfield include discharging facilities in his designs. (Stanfield Aff. of 09/15/09, ¶ 6.) When Mr. Stanfield attempted to discuss the issue with Mr. Law, "Mr. Law rarely, if ever, would take my phone calls. . . It got to the point where [Mr. Law's assistant] would simply respond that Mr. Law would not agree to meet with us regarding that subject [of requiring discharges into Pioneer and Bureau of Reclamation facilities]." *Id.*

City reviewers. This is yet another indication that Pioneer's concerns for its systems' conveyance capacity are not being given legitimate consideration in the City's development review process.

(Pioneer's Expert Witness Disclosure of 07/10/09, Ex. B, p. 8.)

The City's *application* of the Manual is a disputed factual issue that must be resolved at trial. It is therefore inappropriate at this time for the Court to issue a blanket ruling that the Manual is valid.

B. There Are Disputed Issues Of Material Fact Regarding Pioneer's Claims For Nuisance, Trespass, Section 42-1209, and Injunction To Be Resolved At Trial

1. All Five Outfalls Are Subject To Potential Removal

The City correctly notes that Pioneer has thus far identified five outfalls for removal in this litigation: Outfalls A-15, A-17, B-1, 5-2, and 5-10.⁶ (Pioneer's Written Statement of 3/12/09.) The City requests a holding from this Court that Outfalls A-15, A-17, and 5-2 are not subject to removal because they were not owned or constructed by the City. (City's Mem. in Supp., pp. 30-31.) However, there are still issues of fact as to the ownership and construction of these outfalls that need to be resolved at trial. Therefore, a summary judgment holding that these three outfalls are not subject to removal would be inappropriate.

With respect to Outfall 5-2, by the City's own admission, that outfall "provides drainage for city streets. . . ." (Affidavit of Brent Orton in Support of Caldwell's Motion for Summary Judgment of July 28, 2009, ¶ 12.) Because that outfall "provides drainage for city streets," it should remain subject to "removal" in this litigation.⁷ While, according to the City,

⁶ Again, due to the City's extremely late disclosure of critical stormwater outfall data, this number may increase.

⁷ As the City notes and emphasizes in its brief, counsel for Pioneer stated at the hearing on City's motion to dismiss that Pioneer seeks removal of outfalls that "the City has constructed, the City owns, *the City continues to discharge*." (City's Mem. in Supp., pp. 31-32.) Moreover,

Outfall 5-2 also drains other properties, (*id.*), that does not mean that it is not still subject to “removal,” because the City’s pipe that connects into Outfall 5-2 can be removed. Therefore, the fact that Outfall 5-2 “provides drainage for city streets” is sufficient to subject it to removal in this litigation.

Outfalls A-15 and A-17 are both associated with the “Montecito Park No. 1” subdivision development. (Affidavit of R. Scott Stanfield of 09/11/09, ¶ 2.) Both of these outfalls drain Aviation Way, a City Street. *Id.* They do not drain any privately-owned land, and they “do not provide any stormwater drainage benefit to the Montecito Park No. 1 subdivision whatsoever.” (Stanfield Aff. of 09/11/09, ¶ 4.) More specifically, “the City of Caldwell, via the drainage of Aviation Way, is the *only entity benefiting* from outfalls A-15 and A-17.” (Stanfield Aff. of 09/11/09, ¶ 5 (emphasis added).) Based upon this affidavit testimony, there is certainly a material issue of fact as to whether the City “owns” Outfalls A-15 and A-17.

In addition, electronic correspondences in the file of City engineer Lee Van De Bogart indicate that the City has historically sent maintenance crews to these Outfalls, in response to complaints from the public regarding flooding. (Campbell Aff., ¶ 5, Ex. D.) In particular, an e-mail from Mr. Van De Bogart states that, “[t]he city street crew has modified the existing overflow to the A Drain at the north end of the subdivision. . . .” (Campbell Aff., ¶ 5, Ex. D, Bates No. COC007285.) If the City truly does not “own” those outfalls, then why would it be sending repair crews to “modify” the outfalls? These references in the record are sufficient to create an issue of fact as to whether the City “owns” these outfalls.

as this brief has already explained, Pioneer’s expert witnesses are currently evaluating the City’s recent, extremely late disclosure of stormwater outfall maps. Additional outfalls may need to be identified for potential removal as a result.

Moreover, and critically, the original design plans for the Montecito Park No. 1 subdivision did not include the A-15 and A-17 outfalls. (Stanfield Aff. of 09/11/09, ¶ 3.) This was for good reason, because:

The direct discharge of urban storm water from Aviation Way into the “A” Drain was not necessary because during a large storm event, the grading of Aviation Way would direct storm water sheet flows off of the street and onto an adjacent grass landscape strip lying between the street and the “A” Drain. The grass landscape strip provides an infiltration buffer between Aviation Way and the “A” Drain. Any remaining storm water sheet flows draining off of Aviation Way not absorbed or infiltrated through the grass landscape buffer would then diffusely flow into the “A” Drain.

(Stanfield Aff. of 09/11/09, ¶ 4.)

However:

Despite my expression of the foregoing concerns and explanation, the City of Caldwell’s engineering department ***required*** the design and installation of the outfalls known as A-15 and A-17. My design and the eventual construction of outfalls A-15 and A-17 ***were done only because of the requirements of Caldwell engineering officials.*** The outfalls would not have been designed or constructed ***but for Caldwell’s requirements***, particularly because of: (1) Pioneer’s zero discharge urban storm water policy, (2) the fact that the outfalls themselves were not necessary for drainage purposes, and (3) because the Montecito Park No. 1 subdivision derives absolutely no benefit from the outfalls. In sum, the City of Caldwell, via the drainage of Aviation Way, is the only entity benefiting from outfalls A-15 and A-17.

(Stanfield Aff. of 09/11/09, ¶ 5 (emphasis added).)

In other words, despite practical reasons to the contrary, the City ***specifically directed and required*** that the developer and its engineer install Outfalls A-15 and A-17 in Pioneer’s “A” Drain. This affidavit testimony is sufficient to create an issue of fact as to whether the City “constructed” those Outfalls.

2. There Is Ample Record Evidence Of Interference With The Operation, Use, And Enjoyment Of Pioneer's Irrigation Easements, Rights-Of-Way, And Facilities

The City argues that, "PID has identified no facts that would justify removing these five outfalls" that Pioneer has identified for potential removal. (City's Mem. in Supp., p. 12.) First, to clarify the applicable legal framework, the City's arguments on this issue are relevant only to Pioneer's request for removal based upon nuisance. The City's arguments do not affect Pioneer's request for removal based upon a theory of trespass, because Pioneer simply needs to show invasion of the real property interest in order to prevail on its trespass claim. *See, e.g., Mock v. Potlatch Corp.*, 786 F.Supp. 1545, 1548 (D.Idaho 1992). And, the City's arguments do not affect Pioneer's request for removal based upon violations of Idaho Code Section 42-1209 and related statutes. Those statutes provide Pioneer with discretion to remove outfalls that it determines unreasonably or materially interfere with Pioneer's easements or rights-of-way. While an encroaching party may initiate a legal action against Pioneer if it disagrees with Pioneer's determination, there is no threshold requirement for Pioneer to prove unreasonable or material interference.

Contrary to the City's assertions, there is sufficient factual evidence of interference with Pioneer's facilities to support Pioneer's claims for removal of the identified outfalls based upon nuisance. With respect to water quality, based upon a review of national literature regarding stormwater conducted by Pioneer expert witness Mark Ewbank, P.E., it is well-documented that:

When the land is developed, impervious surfaces readily wash pollutants off of roads, rooftops, lawns, and other areas into the surface water drainage and receiving water system. Urban storm water runoff typically contains moderate to high concentrations of sediment, carbon, nutrients, trace metals, hydrocarbons, chlorides, and pathogenic organisms (i.e., protozoa, bacteria, viruses) (U.S.

EPA 2005; Shaver et al. 2007), resulting in degraded water quality compared to predevelopment conditions.

(Pioneer's Expert Witness Disclosure of 07/10/09, Ex. B., p. 9.)

This degraded water quality from urbanization is confirmed by sampling of developed areas within the City of Boise. *Id.*, p. 10. In addition, Pioneer expert witness P. Steven Porter, P.E., Ph.D. states:

A particular concern with using urban storm water to irrigate residential landscapes is the potential for human contact with human microbial pathogens. Contamination occurs when there is contact between human or animal fecal matter and urban storm water. Sources of bacterial contaminants in urban storm water include septic systems, sanitary sewers that are leaking or improperly connected to storm drains, combined storm and sanitary sewers, pet waste and wildlife (Shaver et al, 2007; CH2MHILL, 2003).

(Pioneer's Expert Witness Disclosure of 07/10/09, Ex. G, § II.)

Dr. Porter also states that, "[u]rban runoff is a leading cause of water quality impairment of US streams (EPA, 2000)," and that "[u]rban storm water in the Boise metropolitan area often contains coliform (fecal and E. coli) numbers that far exceed Idaho standards for primary and secondary contact." *Id.*, § IV. All of this information is sufficient to create a material issue of fact as to whether the outfalls identified for removal in this litigation sufficiently interfere with Pioneer's facilities to justify removal.

With respect to risk of flooding, Mr. Ewbank again cites to the 2005 EPA report, stating that the annual volume of stormwater runoff can increase by 2 to 16 times over pre-development levels. (Pioneer's Expert Witness Disclosure of 07/10/09, Ex. B, p. 3.) Mr. Ewbank also performed extensive calculations regarding predicted peak flows and runoff volumes at certain locations within Pioneer and the City, which show an increase in flooding risk caused by development and urbanization. *Id.*, pp. 3-6.

The risk of flooding is illustrated by electronic correspondence from the U.S. Bureau of Reclamation describing efforts by the City of Nampa to relieve flooding in the Bureau's West End Drain, which is operated by Pioneer. According to that correspondence:

City Sewer treatment plant is within 1 inch of flooding and causing extensive secondary problems. There is a dire need to prevent property damage & remedy life-threatening situations like 17 year old as killed in drain a day or so ago.

(Campbell Aff., ¶ 6, Ex. E.)

In order to address the situation, the City of Nampa was required to engage in "emergency pumping of storm water to [Bureau of Reclamation] drains to prevent property damage and maintain public health & safety in many locations within the City [of Nampa]." *Id.*

The City also mischaracterizes deposition testimony of Pioneer Superintendent Jeffrey Scott. According to the City, "Scott identified one instance of flooding since he began working with PID in approximately 1996." (City's Mem. in Supp., p. 16, n. 6.) However, during Mr. Scott's deposition, he specifically testified regarding flooding that occurred from Pioneer's Phyllis Canal in 2005. (Campbell Aff., ¶ 7, Ex. F (Scott Dep.) 221:3-14.) According to Scott, urban stormwater was a contributing factor to that flooding. *Id.* This testimony further supports the conclusion that there are material issues of fact yet to be resolved at trial as to whether unauthorized stormwater discharges interfere with Pioneer's easements and rights-of-way.

In addition, a report prepared by Pioneer expert witness Dr. Charles E. Brockway, Ph.D., P.E., demonstrates that increasing development within the City of Caldwell will increase the risk of flooding from Pioneer facilities. (Pioneer's First Supp. Expert Witness Disclosure of 07/27/09, Ex. A, p. 2.) This is because as development increases, both the peak discharge rate and the total runoff volume increase. *Id.* And, even assuming the City mandates construction

and maintenance of perfectly functioning stormwater detention facilities, the total runoff volume into Pioneer's facilities still increases with development. *Id.* Again, this data demonstrates that there is a material issue of fact as to whether unauthorized stormwater outfalls interfere with Pioneer's easements and rights-of-way.

With respect to maintenance, the affidavit of Pioneer Assistant Superintendent Mark Zirschky, filed contemporaneously herewith, explains that stormwater discharges into Pioneer's easements and rights-of-way interfere with Pioneer's ability to maintain those facilities. As that affidavit explains, there is generally a three-week window after Pioneer's facilities dry out at the end of the irrigation season and before the ground freezes, during which Pioneer must perform its off-season maintenance activities. (Zirschky Aff., ¶¶ 3-5.) These maintenance activities include: (1) ditch burning; (2) blading the bottoms of the canals; (3) sloping and re-shaping the banks; (4) removing any silt buildup; (5) V-ditching small laterals; (6) addressing and fixing any problems with the irrigation delivery system observed or reported during the irrigation season; and (7) application of aquatic herbicides. (Zirschky Aff., ¶¶ 5, 13.) All of these activities are complicated, made more difficult, made more dangerous, and/or made less effective by the presence of water in the facilities. (Zirschky Aff., ¶¶ 6-11.) Even for relatively routine activities such as the trimming of trees and bushes along the banks of conveyance facilities, the presence of water in the facilities makes those activities more dangerous. (Zirschky Aff., ¶ 12.)

3. Injunction Is A Remedial Measure That Should Not Be Addressed Until Trial

The City requests a summary judgment holding that Pioneer is not entitled to injunctive relief. (City's Mem. in Supp., pp. 37-41.) As a practical matter, there is simply no basis for a holding that Pioneer is not entitled to any injunctive relief as a matter of law at this

point in the litigation. Whether Pioneer is entitled to injunctive relief depends upon the resolution of its underlying causes of action. “The right to proceed in equity for an injunction against unlawful use of an easement is well settled.” *Seventeen, Inc. v. Pilot Life Ins. Co.*, 205 S.E.2d 648, 653 (1974) (dealing specifically with collection and diversion of water into a drainage ditch).

As an initial matter, it appears that the City is attempting to increase Pioneer’s burden for establishing that injunctive relief is appropriate. Pioneer recognizes that its complaint requests a “permanent injunction” to remove unauthorized outfalls into its facilities, (Pioneer’s Second Amended Complaint for Declaratory and Injunctive Relief of 03/02/09, p. 12). However, an injunction ordering the removal of outfalls is not truly a “permanent injunction” as that term is used by the courts. Once an outfall is removed, the injunction is satisfied. This differs from a true permanent injunction, which is “perpetual in effect.” 42 AM.JUR.2D *Injunctions* § 10 (2000; supp. 2009). Therefore, there is no basis for requiring Pioneer to satisfy the heightened standard for “permanent injunctions” espoused in the *eBay, Inc. v. Mercexchange, LLC* case cited by the City. “In general, the grounds for injunctive relief are irreparable injury and inadequacy of legal remedies.” *Shoshone-Paiute Tribe v. U.S.*, 889 F.Supp. 1297, 1310-11 (D.Idaho 1994) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)).

In this action, Pioneer asserts causes of action against the City for nuisance and trespass. Injunctive relief is certainly an appropriate remedy for both of these causes of action. The plain text of Section 52-111, which provides the remedies for nuisance claims, specifically states that, “the nuisance may be enjoined or abated.” And, the Idaho Supreme Court has repeatedly held that injunctions are appropriate to remedy trespasses. *See, e.g., The Highlands, Inc. v. Hosac*, 130 Idaho 67, 72, 936 P.2d 1309, 1314 (1997). This is particularly the case for

“repeated or continuing trespasses.” *Legg v. Barinaga*, 92 Idaho 225, 228, 440 P.2d 345, 348 (1968); *see also Johnson v. Twin Falls Canal Co.*, 66 Idaho 660, 675-76, 167 P.2d 834, 840-41 (1946).

The City also argues that Pioneer is not entitled to injunctive relief in this matter because Pioneer has not suffered any injury. (City’s Mem. in Supp., pp. 38-39.) The preceding section of this brief establishes that there are material issues of fact to be resolved at trial regarding the nature and extent of injury to Pioneer caused by unauthorized stormwater outfalls owned or constructed by the City. Until those factual issues are resolved, it would be wholly inappropriate to hold as a matter of law that Pioneer is not entitled to injunctive relief in this matter.

The City also spends considerable effort arguing that “the balance of hardships tips heavily in Caldwell’s favor,” and that “the public interest would be disserved if a permanent injunction were issued.” (City’s Mem. in Supp., p. 39-41.) Simply put, the City does not have a monopoly on public policy arguments. As Pioneer has explained, statutes such as Idaho Code Sections 42-1102, 42-1208, and 42-1209 reflect the Idaho Legislature’s strong public policy declaration against encroachments into and interference with irrigation easements and rights-of-way.

The City complains that removal of the five outfalls at issue in this litigation would cost the City \$3,649,847, but gives no consideration to the amount of money Pioneer and its patrons will need to expend to address and accommodate unchecked stormwater discharges into Pioneer’s facilities, the use of which City seeks to co-opt for its own purposes free of charge. This alleged damages figure being propounded by the City is the subject of Pioneer’s

accompanying motion to strike, and is called into serious question by the affidavit of expert witness William Mason, filed contemporaneously herewith.

The bottom line, however, is that City's request is simply premature. This Court can make a much more informed decision on these issues after a trial on the merits of Pioneer's underlying causes of action. Therefore, the City's request for a summary judgment holding that Pioneer is not entitled to injunctive relief should be denied.

The only basis for granting the City's request on this issue at this point in the litigation would be if the Court were to grant the City's motion in its entirety. However, as this brief establishes, there are still material issues of fact to be resolved at trial with respect to Pioneer's claims for removal.

C. Under Idaho Law, Pioneer Has Exclusive Possession To Its Primary Easements, Which Is Sufficient To Support Its Trespass Claim

The City argues that Pioneer's trespass claim against the City must fail because, according to the City, Pioneer lacks the requisite exclusive right of possession in its facilities. (City's Mem. in Supp., pp. 32-33.) The City's argument fails because it deliberately ignores the critical difference between Pioneer's *primary* easements and its *secondary* easements. Simply stated, the primary easement consists of the bed-and-banks of the conveyance facility that actually contains the water. The secondary easement is the strip of land along the conveyance that an irrigation district needs for access, repair, and maintenance purposes. As has been recently confirmed by Judge Wilper in the *ACHD v. Settlers* litigation, irrigation districts in Idaho *do* have the right of exclusive possession in their primary easements.

1. **The Idaho Supreme Court Has Specifically Stated that Irrigation Easements and Rights-of-Way Are “Exclusive”**

In *Burt v. Farmers’ Co-op. Irr. Co.*, the Idaho Supreme Court addressed the rights of the Farmers’ Cooperative Irrigation Company and the Noble Ditch Company in their water conveyance facilities. 30 Idaho 752, 168 P. 1078 (1917). The Court specifically stated:

The rights of way of respondents are easements, but are permanent in their nature, and are of such character that their owners have *exclusive and continuous possession and control thereof*.

Burt, 30 Idaho at 756, 1068 P. at 1084 (citation omitted) (emphasis added).

The Idaho Supreme Court has also stated that, “[t]he use to which a right of way is devoted or for which it is created determines the character of title with which the holder is vested.” *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 626, 277 P. 542, 544 (1929).⁸ In other words, Idaho law recognizes that an irrigation right-of-way can indeed include an exclusive right of possession. *See also Hale v. McCammon Ditch Co.*, 72 Idaho 478, 488, 244 P.2d 151, 157 (1951) (“[i]rrigation ditches. . . are real property. . .”).

⁸ To be clear, there is a statement in *Coulsen* that, “[t]here is not the same necessity for exclusive possession of a right of way by canal companies as railroads.” 47 Idaho at 620, 277 P. at 544. However, as recognized by Judge Wilper, (Wilper Order, p. 10), the court in that case was specifically discussing only the “secondary” easement, *i.e.*, “the exterior limits of the right of way.” 47 Idaho at 625, 277 P. at 543-45. This is established by the fact that the court in *Coulsen* stated that, “[t]he use of right of way for a ditch or canal does not require the exclusive possession of, or complete dominion over, the *entire tract* which is subject to the ‘secondary’ as well as the principal easements.” 47 Idaho at 627, 277 P. at 544-45 (emphasis added). Again, Pioneer has never claimed exclusive possession of an “entire tract” nor of the secondary easement—only the primary easement. In addition, *Coulsen* (a 1929 opinion) and similar Idaho Supreme Court opinions, such as *Reynolds Irr. Dist. v. Sproat*, 69 Idaho 315, 206 P.2d 774 (1949); and *Pioneer Irr. Dist. v. Smith*, 48 Idaho 734, 285 P. 474 (1930), were all decided well before the Idaho Legislature’s enactment of Idaho Code Section 42-1208, S.L. 1981, ch. 344, § 1, and Section 42-1209, S.L. 2004, ch. 179, § 3. As the next section of this brief will explain, those statutes express the Idaho Legislature’s intent that irrigation easements and rights-of-way should be exclusive, at least as far as the primary easement is concerned.

Finally, in *Canyon View Irr. Co. v. Twin Falls Canal Co.*, the Idaho Supreme Court addressed the issue of whether one water delivery entity (Canyon View) could legally condemn an irrigation delivery canal owned and operated by another water delivery entity (TFCC). 101 Idaho 604, 619 P.2d 122 (1980). Ultimately, the Court held that Canyon View could indeed legally condemn a portion of TFCC's canal system. 101 Idaho at 612, 619 P.2d at 130.

There would have been no need for the Court to make this holding if TFCC did not have an exclusive right of possession in its facilities. In other words, if TFCC did not have an exclusive right of possession of its water conveyance facilities, then there would have been nothing for Canyon View to condemn. Indeed, in coming to this holding, the Court specifically stated that irrigation rights-of-way can be legally condemned, and that, "[i]n such cases, the original easement owner is not really being deprived of his easement outright; only its *exclusive* use." 101 Idaho at 608, 619 P.2d at 126 (emphasis added).⁹

In summary, the Idaho Supreme Court has specifically stated on multiple occasions that irrigation rights-of-way involve the right of "exclusive" possession. The City relies upon three Idaho cases, one Oregon case, and one Minnesota case for the proposition that prescriptive easements do not provide an exclusive right of possession. (City's Mem. in Supp., pp. 32-33.) Critically, *none of those cases deal with water conveyances*. Therefore, they are

⁹ It is important to clarify that the holding in *Canyon View* that one water delivery entity can condemn the canal system of another water delivery entity does not help the City in this litigation. The City has never asserted a condemnation claim, nor has it ever offered Pioneer any compensation for the use of its integrated water delivery and drainage system. The City instead seeks to co-opt the use of Pioneer's system at no cost to the City, and by shifting all of the associated risks, costs, and liabilities to Pioneer.

not applicable and must yield to the Idaho Supreme Court's holdings previously discussed that specifically involve water conveyance facilities.

Fundamentally, confirming that owners of irrigation easements and rights-of-way have exclusive possession of the primary easement is good public policy. In the typical example of a prescriptive easement to travel over or through the land of another, the servient estate can still be used for other purposes by the servient landowner when the servient estate is not in use by the dominant estate holder. *This is not the case with water conveyances such as irrigation canals, lateral ditches, and drains.* The only use that can be made of a water conveyance facility is the conveyance of water. This is particularly the case today with respect to Pioneer's facilities—due to unauthorized discharges into Pioneer's facilities, many of those facilities now have water in them year-round, rather than only during the irrigation season. (*See generally, Zirschky Aff.*)

This is precisely why Pioneer's primary easements and its secondary easements are treated differently. Again, Pioneer's secondary easement consists of land along its facilities that it needs for access purposes. Because that easement can be used for other purposes by the servient landowner when they do not conflict with use by Pioneer, the secondary easement is "non-exclusive". Pioneer freely admits this. Pioneer's primary easement, on the other hand, which consists of the bed-and-banks within the water conveyance itself, is most certainly exclusive to Pioneer.

There is another reason that the cases relied upon by the City do not undercut the exclusive nature of Pioneer's interests in its facilities: all of those cases involve common law prescriptive easements. While Pioneer has claimed prescriptive easements as an alternative basis in this litigation, first and foremost, Pioneer's real property interests in its facilities are in the

form of express easements and rights-of-way, (*see, e.g.*, Section II.B, *supra*), or statutory rights-of-way pursuant to Idaho Code Section 42-1102. This issue was explained in detail in the Reply Memorandum in Support of Pioneer Irrigation District's Motion for Partial Summary Judgment, filed September 3, 2009, pages 9 through 15.

In other words, Pioneer need not specifically prove the five elements necessary to establish a prescriptive easement. Therefore, it is a non sequitur for the City to assume that common law prescriptive easement cases specifically apply to the definition of Pioneer's real property interest.

2. The Idaho Legislature Has Provided Irrigation Districts With Exclusive Rights Of Possession In Their Facilities

A review of Idaho statutes governing irrigation facilities demonstrates the Idaho Legislature's intent to provide irrigation districts with exclusive rights of possession in their facilities. In particular, Section 42-1208 states that irrigation easements and rights-of-way "are not subject to adverse possession," and prohibits the obstruction of such facilities. Sections 42-1209 and 42-1102 require written authorization before any encroachments are constructed in an irrigation easement or right-of-way, and even provide irrigation districts with the right to remove an encroachment that unreasonably or materially interferes with the use and enjoyment of the easement or right-of-way. According to Judge Wilper:

Idaho Code § 42-1209 is a statutory grant of a right to *exclude* [emphasis added]. When viewed in conjunction with Idaho Code § 42-1208, which prevents adverse possession of the property interest in a canal or ditch¹⁰, and with § 42-1202, which imposes

¹⁰ Pioneer's drainage facilities are accorded the same status as its delivery canals. *See* IDAHO CODE § 42-1107. In addition, many of Pioneer's drains also act as irrigation water delivery facilities. (*See, e.g.*, Pioneer's Expert Witness Disclosure of 07/10/09, Ex. L, pp. 9-10.) Moreover, Sections 42-1208 and 42-1209, which provide the basis for Judge Wilper's conclusion that the Idaho Legislature intends for irrigation districts to have an exclusive right of possession in their facilities, do not distinguish between canals and drains.

liability for the integrity of the canal on its owner, it is clear that the Idaho legislature intended to grant an *exclusive* [emphasis added] right of possession in the primary easement, which consists of the ditch itself. Therefore, Plaintiff's [ACHD] motions for summary judgment dismissing Defendant's [Settlers] nuisance, trespass, and quiet title claims for failure to show an exclusive right of possession are DENIED [emphasis in original].

Wilper Order, p. 11.¹¹

And, even if the Court still found these authorities unpersuasive, it is certainly the case that, as between Pioneer and the City, Pioneer has the exclusive right of possession of its easements and rights-of-way. Simply put, and as confirmed by Judge Wilper, the Idaho Legislature has specifically provided irrigation districts with the right of exclusive possession in their primary easements and rights-of-way.

3. The City's Argument That Other Discharges Are Present In Pioneer's Facilities Fails Because The City Confuses Factual Exclusivity With Legal Exclusivity

The City also argues that Pioneer cannot demonstrate exclusivity because there are other discharges into Pioneer's facilities. (City's Mem. in Supp., p. 33.) However, the City is confusing *factual* exclusivity with *legal* exclusivity. All that is required for a trespass claim is the *legal right* to exclusive possession. The City cites no legal authority for the proposition that a trespass claimant must demonstrate *factual* exclusivity, *i.e.*, that there are no other encroachments upon his or her exclusive possession.

In addition, many of the other discharges into Pioneer facilities referenced by the City may indeed be authorized. As to those other outfalls that are unauthorized, it would

¹¹ Wilper's discussion leading up to this conclusion and holding references the fact that a canal in that case was an "Act of 1866" canal. Wilper Order, pp. 5-6, 10. However, a review of the totality of that section of the Wilper Order demonstrates that the Idaho Supreme Court cases and Idaho statutes already discussed provide an independent basis to conclude that irrigation districts have the right of exclusive possession in their primary easements and rights-of-way.

certainly be a perverse state of affairs if Pioneer were precluded from seeking removal of the City's unauthorized outfalls due to the fact that other unauthorized outfalls are also present in Pioneer's facilities. Essentially, what the City is arguing is that, the worse the problem of unauthorized discharges is, the harder it should be for Pioneer to seek removal of those discharges. This makes no sense.

D. The "Exhaustion" Doctrine Does Not Bar Any Of Pioneer's Independent Claims For Relief

The City argues that Pioneer cannot challenge three of the five outfalls identified for potential removal, because Pioneer failed to exhaust administrative remedies that were purportedly available to Pioneer to challenge those three outfalls. (City's Mem. in Supp., pp. 41-45.) This argument fails for several reasons.

First, as an initial matter, the City appears to mischaracterize its own argument. As quoted by the City, the cases relied upon by the City to support its exhaustion argument state that, "no one is entitled to judicial relief for a supposed or threatened injury *until* the prescribed administrative remedy has been exhausted." *White v. Bannock County Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003) (citations omitted) (emphasis added). Similarly, "the doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings *before* an application for judicial relief may be considered." And, the Idaho Administrative Procedure Act's "exhaustion" statute states that, "[a] person is not entitled to judicial review of an agency action *until* that person has exhausted all administrative remedies required in this chapter. IDAHO CODE § 67-5271(1) (emphasis added). The highlighted language in the above three quotes indicates that the doctrine of exhaustion applies when a party has sought judicial review prematurely, while an administrative proceeding is still pending.

In reality, the City appears to argue that Pioneer missed the deadline for appealing the City Engineer's "decision" approving the three outfalls in question. Regardless of whether the argument is properly couched as exhaustion or as missing an appeal deadline, such arguments fail for the same reasons.

First, it is important to clarify that in seeking removal of the outfalls at issue, Pioneer is not simply challenging some technical aspect of the City Engineer's approval of the outfalls. Were that the case, then the City's argument would, perhaps, have some legitimacy. Critically, in requesting removal of the outfalls, Pioneer is seeking to enforce its own *independent* rights—specifically, its statutory rights under Idaho Code Sections 42-1102, 42-1209,¹² and 52-101, *et seq.*, and its common law real property rights to be free from trespass. The City cites *no* legal authority for the radical proposition that an alleged "administrative proceeding[]" before the City Engineer somehow deprives Pioneer of the ability to protect its own independent real property interests.

Second, Pioneer was never under any obligation to "appeal" the City Engineer's approval of the outfalls in question, because the Caldwell Storm Drainage Ordinance and the City's Manual only apply to Pioneer if Pioneer is proposing to construct its own storm drainage

¹² Historically, the City's land use approval process and Pioneer's licensing agreement process pursuant to Section 42-1209 have operated independently. In other words, due to its perceived ability to protect its interests under Section 42-1209, Pioneer never felt it had to officially protest or challenge land use proceedings before the City in order to ensure that its interests were protected. By asserting that Pioneer is now barred from enforcing its rights due to the alleged conclusiveness of a prior City land use proceeding, the City is essentially arguing that, in order for Pioneer to protect its interests, Pioneer must officially protest every land use application before the City that has the potential to affect Pioneer's facilities. This is certainly unfortunate, as this will certainly result in unnecessary delay and expense for the land use applicants. Ultimately, if this Court agrees with the City's position, Pioneer potentially would be forced to seek judicial review of every City land use decision which includes municipal stormwater discharges into Pioneer facilities.

system. A review of the Ordinance and the Manual demonstrate that they were adopted in order to establish standards with which “builders, contractors, developers and property owners” must comply when they construct their own new storm drainage systems. *See* Caldwell City Code § 13-01-03, provided within Exhibit G to the Campbell Aff. Therefore, there is no basis for subjecting Pioneer to an appeal deadline when it is simply protecting its own real property interests and enforcing its statutory rights under Section 42-1209.

Third, by its own terms, the appeal provision relied upon by the City states that a “party” aggrieved by a decision of the City Engineer “may” appeal. Caldwell City Code § 13-01-09(1).¹³ In the context of administrative, judicial, and quasi-judicial proceedings, the use of the term “party” connotes a person or entity that is officially participating in a proceeding. *See, e.g.*, I.R.C.P. 3(b), 10(a)(1), 45(b)(2). Even the Idaho Administrative Procedure Act (“APA”)¹⁴ itself, which governs appeals of administrative and land use decisions, defines “party” as a “person or agency *named or admitted as a party*. . . .” IDAHO CODE § 67-5201(13) (emphasis added). However, the City has not adduced any evidence that Pioneer was a “party” to any “proceeding” before the City Engineer.

To build upon this point, the Idaho APA and fundamentals of constitutional Due Process specifically require that an administrative order must be “in writing” before an appeal

¹³ The use of the term “may” is in stark contrast to the appeal provision in the Idaho Administrative Procedure Act, which states that petitions for judicial review “must” be filed within the allotted time. IDAHO CODE § 67-5273.

¹⁴ Pioneer recognizes that the Idaho APA does not necessarily directly apply to an appeal of a decision of the City Engineer. However, the Idaho APA is essentially a codification of Due Process requirements that apply to administrative and land use proceedings. Therefore, the fundamental requirements of the Idaho APA (such as requirements for decisions to be in writing, service of orders upon parties, communication of appeal procedures, *etc.*) should apply to *any* administrative, land use, or quasi-judicial proceeding. To ignore these fundamental requirements would violate constitutional Due Process.

deadline is triggered. IDAHO CODE §§ 67-5248(1); 67-5273(2). Where is the written order or decision by the City Engineer that triggered the appeal deadline? The City does not say. The only document that arguably qualifies is the stormwater drainage calculation document that was approved by the City Engineer, and which is attached to the Randolph Affidavit as Exhibit P. However, that document is not legally sufficient to trigger an appeal deadline applicable to Pioneer for several reasons.

First, there is nothing indicating that document was ever served upon Pioneer. Pursuant to the Idaho APA, fundamental Due Process, and common sense, Pioneer must actually be served with an order that supposedly triggers an appeal deadline, if Pioneer is to be subject to that appeal deadline. IDAHO CODE § 67-5248(3). Second, even if this document were served upon or provided to Pioneer, there is nothing in that document which actually communicates the appeal deadline. This is also contrary to the Idaho APA and fundamental Due Process. *See* IDAHO CODE § 67-5248 (an administrative order “shall include. . . a statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief”). Third, as a factual matter, the City does not explain or substantiate its unsupported assertion that the drainage calculation document “depicts data relating to each of the storm drainage facilities included in the subdivision, including Outfalls A-15 and A-17.” (City’s Mem. in Supp., p. 44.) A plain review of that document certainly does not demonstrate its relationship to the outfalls at issue. And, even if that document does contain some calculations related to the outfalls, such calculations certainly do not qualify as “reasoned statement[s] in support of the decision” or “concise and explicit statement[s] of the underlying facts of record,” as required by the Idaho APA and fundamental Due Process requirements. IDAHO CODE § 67-5248(a).

In addition to all of the above arguments, the Idaho Supreme Court has specifically recognized two exceptions to the “exhaustion” doctrine. “In relaxing the doctrine of exhaustion this Court held that the rule will be departed from under certain circumstances, first, where the interests of justice so require and secondly, where the agency acts outside its authority.” *Arnzen v. State*, 123 Idaho 899, 906, 854 P.2d 242, 249 (1993).

Because Pioneer is seeking to enforce its independent legal rights, rather than simply appealing some technical aspect of the City’s approval of the outfalls in question, justice certainly requires that the exhaustion doctrine not be applied to preclude Pioneer’s claims. In addition, the approval of unauthorized outfalls in Pioneer’s facilities certainly exceeds the scope of the City’s authority.

In summary, the City’s exhaustion argument is both legally and factually deficient. It is legally deficient, because there is no basis to conclude that some alleged “proceeding” before the City Engineer deprives Pioneer of the ability to enforce its own, independent legal rights. It is factually deficient, because the City has not adduced any facts which would arguably form the basis for imposing an appeal deadline upon Pioneer. Again, the City has not established: (1) that Pioneer was a “party” to any proceeding; (2) that a written order compliant with Due Process requirements was ever issued by the City Engineer; (3) to the extent any such written order exists, that it specifically deals with the subject outfalls; (4) to the extent any such written order exists, that it was ever served upon Pioneer. Given that this is the *City’s* motion for summary judgment, the City had the responsibility to establish the factual predicates necessary to subject Pioneer to an appeal deadline and an exhaustion argument. It did not do so.

IV. CONCLUSION

As this brief has explained, certain aspects of and provisions within the Manual conflict with state law. In addition, there are material issues of fact regarding the City's application of the Manual which must be resolved at trial. Therefore, a summary judgment holding that the Manual is "valid" is not appropriate.

There are also material issues of fact with respect to interference with Pioneer's use and enjoyment of its easements and rights-of-way. As this brief has explained, there is copious information in the record demonstrating that stormwater discharges increase the risk of flooding, introduce water of degraded quality, and interfere with Pioneer's ability to effectively and efficiently repair and maintain its facilities. Therefore, a summary judgment holding that Pioneer cannot maintain its claims for removal of unauthorized outfalls is not appropriate.

The City further argues that Pioneer cannot maintain its trespass claim because it lacks sufficient exclusivity of possession of its easements and rights-of-way. This is not correct. Pioneer does have exclusive possession of its primary easements, *i.e.*, the bed-and-banks of its water conveyance facilities. This is confirmed by holdings of the Idaho Supreme Court, and statutes enacted by the Idaho Legislature.

For these and the other reasons more fully explained in this brief, the City's motion should be denied in its entirety.

DATED this 15th day of September, 2009.

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CERTIFICATE OF SERVICE

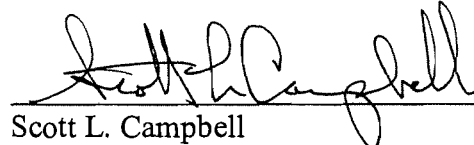
I HEREBY CERTIFY that on this 15th day of September, 2009, I caused a true and correct copy of the foregoing **PIONEER'S RESPONSE BRIEF IN OPPOSITION TO CITY OF CALDWELL'S SECOND MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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Pioneer Irrigation District

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,
Plaintiff,

vs.

CITY OF CALDWELL,
Defendant.

CITY OF CALDWELL,
Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,
Counterdefendant.

Case No. CV 08-556-C

AFFIDAVIT OF SCOTT L. CAMPBELL

STATE OF IDAHO)
) ss.
County of Ada)

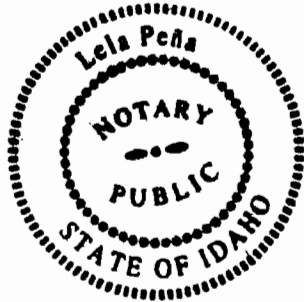
Scott L. Campbell, having been duly sworn upon oath, deposes and states as follows:

1. I am licensed to practice law in the state of Idaho. I am one of the attorneys of record for Pioneer Irrigation District ("Pioneer") in the above-captioned matter and have access to the files that are pertinent to this matter. I make this affidavit based upon personal knowledge.
2. Attached hereto as Exhibit A are true and correct copies of relevant excerpts from the deposition transcript of Pioneer Board Member Alan Newbill.
3. Attached hereto as Exhibit B are true and correct copies of relevant excerpts from the deposition transcript of Pioneer's former Secretary Naida Kelleher.
4. Attached hereto as Exhibit C are true and correct copies of relevant excerpts from the deposition transcript of Gordon Law.
5. Attached hereto as Exhibit D are a series of e-mail correspondences produced by the City of Caldwell as Bates Nos. COC007166-COC007167, COC007184-COC007185, COC007285-COC007287.
6. Attached hereto as Exhibit E is e-mail correspondence from a representative of the U.S. Bureau of Reclamation, Bates No. PID046223.
7. Attached hereto as Exhibit F are true and correct copies of relevant excerpts from the deposition transcript of Pioneer's Superintendent Jeffrey Scott.
8. Attached hereto as Exhibit G are relevant portions of Caldwell's City Code, obtained through the City's website.

Further your affiant sayeth naught.

Scott L. Campbell
Scott L. Campbell

SUBSCRIBED AND SWORN to before me this 15th day of September, 2009.



Lela Peña
NOTARY PUBLIC FOR IDAHO
Residing at Boise
My Commission Expires 5-31-2012

CERTIFICATE OF SERVICE

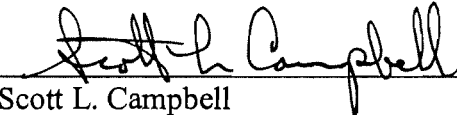
I HEREBY CERTIFY that on this 5th day of September, 2009, I caused a true and correct copy of the foregoing AFFIDAVIT OF SCOTT L. CAMPBELL to be served by the method indicated below, and addressed to the following:

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Scott L. Campbell

EXHIBIT A
TO AFFIDAVIT OF SCOTT L. CAMPBELL

PIONEER IRRIGATION DISTRICT,)
)
Plaintiff,) Case No. CV 08-556-C
)
v.)
)
CITY OF CALDWELL,)
)
Defendant.)
_____)
CITY OF CALDWELL,)
)
Counterclaimant,)
)
v.)
)
PIONEER IRRIGATION DISTRICT,)
)
Counterdefendant.)
)

EXHIBIT A

<p>1 A. I don't know that. Ms. Fowler put that one 2 together for me, so I'm not sure where she got that. 3 Q. And we've already talked about kids playing in 4 irrigation water, correct? 5 A. Um-hmm. It doesn't matter. That just 6 demonstrates that kids do go out and play in the 7 sprinklers. 8 (Deposition Exhibit No. 68 was marked.) 9 Q. (BY MR. STIDHAM) I'm going to hand you a 10 document that I've marked as Exhibit 68. And I'll 11 represent to you that this was taken off Pioneer's 12 Website. 13 Have you seen this document before? 14 A. I suspect I've seen it. I haven't read it 15 extensively. 16 Q. Okay. And take a look about the middle of the 17 page first, to "Rates For 2008." 18 Do you see that? 19 A. Um-hmm. I do. 20 Q. And earlier today we were talking about the two 21 buckets of revenue for Pioneer as being an assessment per 22 acre lot, and then an assessment expense per account. 23 Did I read that -- 24 A. Yeah. 25 Q. And this is kind of a depiction with real</p> <p style="text-align: right;">Page 141</p>	<p>1 A. Say that again for me, please. 2 Q. Sure. 3 Do you recall Pioneer asking the City of 4 Caldwell to remove from Caldwell's stormwater policy any 5 provisions that required a developer to get approval from 6 Pioneer for discharging into Pioneer's stormwater -- 7 excuse me, discharging stormwater into Pioneer's system? 8 A. I actually attended the council meeting that 9 they made that ruling and asked them before they made the 10 ruling not to do that. 11 Q. Asked who not to do that? 12 A. The city council. 13 Q. Not to remove that provision? 14 A. No. To not put that provision in. 15 Q. Okay. Thank you. 16 Okay. So tell me what you recall about that. 17 I just want to ask that broadly about what you recall 18 about those events. And then we'll just kind of go 19 through it a little bit more specifically. 20 A. Okay. I remember that the first people to 21 testify on that were mentioned here as some development 22 engineers that asked specifically not to make it 23 mandatory for stormwater to go into those drains because 24 they physically couldn't make it work. They were going 25 to have to pump the stormwater into the drains to make it</p> <p style="text-align: right;">Page 143</p>
<p>1 numbers as to those two different sources of revenue for 2 Pioneer for 2008; is that fair? 3 A. Yes. 4 Q. Okay. If you look at kind of the paragraph 5 right after the rates are set out, the last sentence 6 says, "If you have less than one acre, you will be 7 charged a one-acre minimum assessment per Idaho code." 8 Did I read that factually? 9 A. Yes. 10 Q. And is that, in fact, how Pioneer assesses 11 folks, if they have less than one acre assessed, they're 12 charged a one-acre minimum assessment? 13 A. I assume. That's what it says here. I've not 14 been involved in that, so I don't know. 15 Q. And you anticipated my next question. And I 16 just wondered if this refreshed your recollection as to 17 how this worked. 18 A. Yeah, I -- it could be that it does. I don't 19 recall. 20 Q. Okay. Fair enough. 21 Do you recall Pioneer asking the City of 22 Caldwell to remove from Caldwell's stormwater policy any 23 provisions that required a developer to get approval from 24 Pioneer for the discharge of stormwater into Pioneer's 25 system?</p> <p style="text-align: right;">Page 142</p>	<p>1 work. 2 After they finished with their presentation, 3 then several of us from Pioneer, including our counsel -- 4 at the time it wasn't Mr. Campbell, it was Andy Waldera 5 that attended these meetings with us. And he made those 6 same comments, please don't make it mandatory. 7 Q. Okay. And I'm asking about a provision that 8 required advance approval from Pioneer. 9 A. Um-hmm. 10 Q. Why is it that Pioneer wanted the City of 11 Caldwell to remove from Caldwell's manual the requirement 12 that an approval be obtained from Pioneer prior to 13 discharging into Pioneer's facilities? 14 A. Say that again, please. 15 Q. Sure. 16 Why is it that Pioneer requested that the City 17 remove from the City's stormwater manual the requirement 18 that an approval be obtained by the developer from 19 Pioneer prior to discharging into Pioneer's facilities? 20 A. I didn't know that we did. 21 Q. Let me see if I can get you a document. 22 A. As far as I know, that's a state statute that 23 approval has to be obtained from the irrigation district 24 before encroachment can be made upon their facilities. 25 Q. Okay. Well, let me ask it this way, then.</p> <p style="text-align: right;">Page 144</p>

1 Because if you don't recall, that's one thing.
 2 Do you recall Pioneer requesting of the City of
 3 Caldwell that the City of Caldwell remove any requirement
 4 that permission be obtained from Pioneer prior to
 5 discharge being made into Pioneer's facilities?
 6 A. I do not recall that.
 7 Q. Okay.
 8 (Deposition Exhibit No. 69 was marked.)
 9 Q. (BY MR. STIDHAM) I'm going to hand you a
 10 document that I've marked as Exhibit 69, if I could.
 11 Before I get into this, let me ask you kind of
 12 a preliminary question.
 13 What did you do to prepare for your deposition
 14 today, Mr. Newbill?
 15 A. Nothing.
 16 Q. Okay. Did you review any documents to prepare?
 17 A. No.
 18 Q. Did you review any minutes of Pioneer board
 19 minutes?
 20 A. No.
 21 Q. Board meetings, excuse me, before you came here
 22 today?
 23 A. No.
 24 Q. Did you meet with your attorneys prior to
 25 coming here today?

Page 145

1 A. For half an hour downstairs before I came up
 2 here.
 3 Q. Okay. Anything other than that?
 4 A. No.
 5 Q. Okay. And if you could, where I'd like to
 6 direct your attention is to -- see these numbers at the
 7 bottom? We call them Bates numbers.
 8 A. Okay.
 9 Q. I'm on page COC 195331.
 10 A. Okay.
 11 Q. And, in fact, back up one page to where it says
 12 COC 195530, if you would, please.
 13 And look at the bottom of the page where it
 14 says, "Public Hearing (Legislative): Consider Bill No.
 15 19."
 16 Do you see that?
 17 A. Um-hmm.
 18 Q. Okay. And the first page -- excuse me. The
 19 first paragraph says, "Gordon Law, 621 Cleveland
 20 Boulevard, gave the staff report. He indicated that the
 21 board members from Pioneer Irrigation District were in
 22 attendance and he had Alan Newbill, Chairman, introduce
 23 the board members."
 24 Did I read that correctly?
 25 A. Um-hmm.

Page 146

1 Q. Okay. And do you recall being present at this
 2 meeting?
 3 A. I went to a couple of meetings. I don't recall
 4 this one.
 5 MR. WILLIAMS: Where is the date on this one?
 6 MR. STIDHAM: It's hard to find.
 7 MR. WILLIAMS: Okay.
 8 MR. STIDHAM: I believe it is 4/17. You see it in
 9 handwriting up there, Brad, at the top?
 10 MR. WILLIAMS: Yeah.
 11 MR. STIDHAM: I believe it's 4/17.
 12 Q. (BY MR. STIDHAM) And I'll represent to you,
 13 Mr. Newbill, these are the City's minutes of the board
 14 meeting -- excuse me, of the city council meeting.
 15 MR. WILLIAMS: Is that '06?
 16 MR. STIDHAM: Yes.
 17 MR. WILLIAMS: Thank you.
 18 MR. STIDHAM: They did a better job -- if you see
 19 the next entry. It's May 1st, 2006.
 20 Q. (BY MR. STIDHAM) So, Mr. Newbill, do you
 21 recall being at a city council meeting at or around April
 22 of 2006 regarding the stormwater management manual?
 23 A. Like I say, I went to several of them, so it's
 24 real possible, sir. But I don't recall.
 25 Q. Okay. Now, if we could proceed to that next

Page 147

1 page.
 2 And do you know who Gordon Law is?
 3 A. Yes, I do.
 4 Q. And he was the city engineer for Caldwell at
 5 around this 2006 time frame, correct?
 6 A. Yes, sir.
 7 Q. Okay. And this is -- top of page COC 195331,
 8 this is relating -- Mr. Law's statements during the
 9 meetings. It says, "Law continued: He received a
 10 request from Pioneer Irrigation District board that is
 11 related to an ongoing concern that they have related to
 12 the Clean Water Act. The board requested the city remove
 13 from their policy a requirement that developers obtain
 14 permission from Pioneer for proposed drainage into an
 15 existing drainage ditch. This has been done."
 16 Did I read that correctly?
 17 A. Yeah, you did.
 18 Q. Do you recall that request that's being -- that
 19 board request that's being referred to in that statement?
 20 A. I do not.
 21 Q. Do you have any reason to believe that the
 22 board didn't make such a request as is being referred to
 23 here?
 24 A. It doesn't sound like something we'd do.
 25 Q. Why not?

Page 148

37 (Pages 145 to 148)

1 A. It's against state statutes, from what I've
2 been told.
3 Q. Okay. Go down two pages, excuse me, two
4 paragraphs, the paragraph that begins, "Andrew Waldera."
5 A. Uh-huh.
6 Q. It says, "Andrew Waldera, attorney for Pioneer
7 Irrigation District, spoke in opposition to this
8 ordinance and handed out documents to Council. Regarding
9 proposed change number 16, which was the request of
10 Pioneer requiring them to obtain district approval for
11 discharge of stormwater into the drains, he requested it
12 be removed. The district cannot approve any plans for
13 developers that affirmatively show stormwater drainage or
14 discharge into any of their facilities. The district
15 does not want the developers seeking the district's
16 approval of plans that they know the district cannot
17 approve and that would be plans that show any kind of
18 discharge into a Pioneer facility."
19 Did I read that correctly?
20 A. Um-hmm.
21 Q. Do you recall Mr. Waldera speaking or
22 testifying in this way at the board meeting -- council
23 meetings?
24 A. Actually, I don't. I think what Andy said was
25 a little different from that. This has got the City's

Page 149

1 own twist on it.
2 Q. What is your twist on it?
3 A. The problem we were running into on that was
4 that Pioneer was saying don't put those discharges in
5 there.
6 And the City was leaving out of the plots (sic)
7 that they were presenting to the district, they were
8 leaving those discharges out of those plots and making a
9 different set of plats that showed those discharges that
10 they didn't give to Pioneer is what I'm remembering on
11 this.
12 Q. Look down a couple paragraphs down. See the
13 paragraph that begins "Mark Hilty, city attorney"?
14 A. Uh-huh.
15 Q. Go a couple sentences into that paragraph.
16 Let's see. One sentence in. It says, "Mr. Hilty asked
17 Mr. Waldera for clarification."
18 Do you see that?
19 A. Um-hmm.
20 Q. It states, "Mr. Hilty asked Mr. Waldera for
21 clarification on the district's position. Is it just
22 don't send the developers to us seeking approval or is it
23 don't pass anything that could ever be used to create
24 discharge into our facilities of urban storm runoff?
25 Mr. Waldera responded that the district does not want any

Page 150

1 knowing discharges into its facility, and it will have
2 to disapprove of or not lend its support to anything that
3 comes before it that does."
4 Did I read that correctly?
5 A. I believe you did.
6 Q. Do you recall that as an accurate statement of
7 Mr. Waldera's testimony at the council meeting?
8 A. It's been too long ago. I don't recall.
9 Q. Do you recall whether or not that's accurate?
10 That's what I'm trying to get at. I asked you whether
11 it's accurate.
12 You just don't recall one way or another
13 whether it was accurate?
14 A. I don't recall if that was Mr. Waldera's
15 comments or not.
16 Q. Fair enough.
17 Do you have any reason to believe that that's
18 not an accurate depiction of Mr. Waldera's comments on
19 that day?
20 A. Other than the state statutes say that anyone
21 wanting to encroach on irrigation district property needs
22 to have the written permission of the irrigation
23 district.
24 Q. Who told you that's what the state statute
25 said?

Page 151

1 A. My counsel.
2 Q. Look at the last page of this document where it
3 says COC 195333.
4 Do you see that?
5 A. Okay. I have it.
6 Q. The second paragraph says, "Alan Newbill of
7 Pioneer Irrigation District stated that there are
8 concerns with Pioneer Irrigation's retention policies
9 versus the City's detention policies."
10 Did I read that accurately?
11 A. Um-hmm.
12 Q. And I'll tell you, if you back up one page,
13 these are the minutes from a regular meeting of the city
14 council on May 1st, 2006.
15 Okay?
16 A. The following meeting of that last one?
17 Q. I'm not sure -- I believe it was the next
18 meeting after that city council meeting.
19 A. Um-hmm.
20 Q. Do you recall discussing that at a city council
21 meeting on or about May 1st, 2006, that there are
22 concerns with Pioneer Irrigation's retention policies
23 versus the City's retention policies?
24 A. I remember we talked about that.
25 Q. What do you recall regarding this May 1st city

Page 152

38 (Pages 149 to 152)

EXHIBIT B
TO AFFIDAVIT OF SCOTT L. CAMPBELL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION)	
DISTRICT,)	
)	Case No. CV 08-556-C
Plaintiff,)	
)	
vs.)	
)	
CITY OF CALDWELL,)	
)	
Defendant.)	
)	
)	
CITY OF CALDWELL,)	
)	
Counterclaimant,)	
vs.)	
)	
PIONEER IRRIGATION)	
DISTRICT,)	
)	
Counterdefendant.)	
)	

DEPOSITION OF NAIDA KELLEHER

August 19, 2009

Boise, Idaho

Susan L. Sims, CSR No. 739

1 the liability of the damages that would be caused
2 by the city dumping into Pioneer's facilities.

3 As it was, if they kept dumping into
4 our facilities, all the liability stood on
5 Pioneer's patrons to pay for every bit of the
6 damages.

7 Q Do you remember that being part of the
8 discussion at this special meeting?

9 A I don't recall that. I knew that he
10 was going to go back and write up a policy. And
11 I don't think it was ever done.

12 Q What is, to the best of your
13 understanding, the board's concern with
14 authorizing the discharge of urban stormwater
15 into Pioneer facilities?

16 MR. CAMPBELL: Object to the form of
17 the question.

18 THE WITNESS: Pioneer will be taking
19 on all the responsibility and the liability. All
20 the consequences, whether it be EPA, the Clean
21 Water Act, flooding, whether E. coli got into the
22 system and we were sued by citizens.

23 Q (BY MR. HILTY) And do you know
24 whether the board has an understanding of what
25 the liability would be relative to EPA or Clean

Page 161

1 which will not put Pioneer in the position of
2 requiring Pioneer to state or sign off on a plan
3 in which the district accepts urban stormwater
4 runoff into the district's facilities.
5 Evidently, that's what was stated, but his --
6 what -- the exact content of what he was
7 thinking, I don't know.

8 Q And do you know whether the board had
9 any understanding of what he was thinking?

10 A I don't know what the --

11 MR. CAMPBELL: Object to the form.

12 MR. HILTY: Fair enough.

13 THE WITNESS: I don't know what the
14 board understood.

15 Q (BY MR. HILTY) Do you know whether
16 Gordon made the comment that Pioneer would be
17 safe from these legal liabilities as long as they
18 did not accept or approve the discharge, even if
19 the discharge took place?

20 A I don't recall that.

21 Q Gordon didn't say anything like that?

22 A I don't know. He may have, but I
23 don't recall it.

24 Q Okay. Is that idea familiar to you,
25 from your memory of these events surrounding in

Page 163

1 Water Act?

2 MR. CAMPBELL: Object to the form.

3 THE WITNESS: I don't know if the
4 board members have an understanding per se.
5 Q (BY MR. HILTY) Do you have an
6 understanding?

7 A Not clearly.

8 Q Do you have any understanding at all?

9 A Only what is outlined in the letter
10 that Scott wrote and is on file about the
11 different liabilities that Pioneer would face.

12 Q Okay. This language that we've been
13 looking at on the second page of Exhibit 71, did
14 you understand that Gordon would draw up a policy
15 that would essentially accede to Pioneer's
16 concerns that there would be no discharge of
17 urban stormwater into Pioneer's facilities; is
18 that what he was going to prepare?

19 MR. CAMPBELL: Object to the form.

20 THE WITNESS: I don't know what
21 Gordon's idea of what he was going to prepare.

22 Q (BY MR. CAMPBELL) Well, you wrote
23 down something about it. Do you remember why you
24 used those words?

25 A He is willing to draw up a city policy

Page 162

1 particular this special meeting?

2 MR. CAMPBELL: Object to the form.

3 THE WITNESS: Repeat what you think he
4 was saying.

5 Q (BY MR. HILTY) When I read your
6 minutes, what it sounded to me like what was
7 being discussed was Pioneer doesn't want to be
8 seen as approving discharge of urban stormwater.
9 So we'll come up with a policy where they don't
10 have to approve anything, even though it may
11 still occur.

12 Was that idea ever discussed at this
13 meeting or elsewhere, in your memory?

14 A They wouldn't --

15 MR. CAMPBELL: Object to the form.

16 THE WITNESS: They wouldn't approve
17 it, but you can do it type of thing?

18 Q (BY MR. HILTY) Yes.

19 A No.

20 Q Let's go down to the next paragraph.

21 The second sentence there reads, "The possibility
22 of the City and Pioneer cooperating in an effort
23 to clean out some of the established drains, or
24 even build additional drains in the areas where
25 the current drains fill to capacity during a

Page 164

EXHIBIT C
TO AFFIDAVIT OF SCOTT L. CAMPBELL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL

DISTRICT OF THE STATE OF IDAHO,

IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,)

Plaintiff,)

vs.)

Case No. CV 08-556-C

CITY OF CALDWELL,)

Defendant.)

CITY OF CALDWELL,)

Counterclaimant,)

vs.)

PIONEER IRRIGATION DISTRICT,)

Counterdefendant.)

DEPOSITION OF GORDON LAW

JULY 23, 2009

Boise, Idaho

JEFF LaMAR, C.S.R. No. 640

<p>1 MR. HILTY: Object to the form. 2 Q. (BY MR. WILLIAMS): -- true? 3 A. That's what that statement says. 4 Q. And who would get to determine whether 5 a proposed discharge decreased the quality? 6 Pioneer? 7 A. Thus the statement says, "It's 8 administered by the City." We would presume that 9 the irrigation district, if they had a question 10 concerning quantity or a question concerning 11 quality that the city engineer would investigate 12 it. 13 Q. I'm trying to understand what your 14 understanding is as of this date, if you had one. 15 Who is the entity or person that gets 16 to decide if a proposed discharge will increase 17 the quantity, pioneer or the City? 18 A. The way I'm reading this is the City. 19 Q. What is it about the way you've worded 20 that that let's you believe it's the City? 21 A. "The policy established the conditions 22 of discharge and it's administered by the City 23 through the office of the city engineer." That's 24 where I get that. 25 Q. What is that based upon? Why did you</p> <p style="text-align: right;">Page 125</p>	<p>1 we used it, it was Title 67. 2 Q. And what did that concern or discuss, 3 as you recall? 4 A. Land-use authority. 5 Q. But this -- that broad power of 6 land-use authority in 67 -- and I can grab that at 7 a break -- this is specifically talking about 8 irrigation districts and their power to veto, to 9 say no, is it not? You're talking about the power 10 of the irrigation district to veto discharges. 11 Isn't that what is specifically being addressed in 12 that note? 13 A. The last half of it, I would agree, 14 that's what it says. 15 Q. And so wouldn't you want to look at 16 the statute that deals with the irrigation 17 company's authority to say no, rather than a 18 general statute that allows you to deal with 19 land-use planning? 20 MR. HILTY: Object to the form. That calls 21 for a legal conclusion. 22 THE WITNESS: You asked if I wanted to. I 23 would look at the statute which gives the City 24 authority to establish the policies. 25 Q. (BY MR. WILLIAMS): My question is, is</p> <p style="text-align: right;">Page 127</p>
<p>1 conclude that you were the body that could 2 determine whether or not a discharge would 3 increase the quantity or decrease the quality? 4 MR. HILTY: I'm going to object to the 5 question to the extent that it calls for a legal 6 conclusion or might disclose communications you 7 had with any attorney representing the City. 8 THE WITNESS: And restate your question. 9 Q. (BY MR. WILLIAMS): Why did you 10 believe that the City had the power and ability to 11 determine -- make this determination -- 12 MR. HILTY: Same objection. 13 Q. (BY MR. WILLIAMS): -- as opposed to 14 Pioneer? 15 MR. HILTY: Same objection. 16 THE WITNESS: Because by my reading of the 17 state statutes, they had the authority to set the 18 policies. 19 Q. (BY MR. WILLIAMS): Oh, you read some 20 state statutes that allowed the City to state 21 storm water policies; is that you mean? 22 A. Storm water and other things as well. 23 Q. Do you recall what statutes you were 24 referring to? 25 A. In that particular instance, because</p> <p style="text-align: right;">Page 126</p>	<p>1 it not apparent -- and I don't mean to be 2 argumentative -- that you're dealing with the 3 irrigation district's veto power, and I asked you 4 what your source of your understanding of law, and 5 you pointed to a generalized statute on land-use 6 planning. 7 And my question is, would you not have 8 wanted to look to the specific statute that deals 9 with the irrigation's veto power, if there is one? 10 MR. HILTY: The objection is that it calls 11 for a legal conclusion. 12 Q. (BY MR. WILLIAMS): You can answer. 13 A. I probably would not look at it. 14 Q. Were you aware if there was any 15 statutory or other authority at that time? 16 A. For what? 17 Q. Dealing with irrigation districts veto 18 powers or powers to say "yes" or "no". 19 A. I don't know. 20 Q. What kind of scientific evidence or 21 documentation would you require in making this 22 determination? You're proposing a discharge into 23 a Pioneer facility, if they object, they think 24 it's going to diminish the quality, and you have 25 the -- you know, it's up to you, the City, what</p> <p style="text-align: right;">Page 128</p>

1 kind of scientific evidence do you need to supply
 2 Pioneer with that it won't, let's say, decrease
 3 the quality? Any at all, or just what you say
 4 goes?
 5 A. You're asking specifically about
 6 quality?
 7 Q. About quality right now.
 8 A. I would have them in their response to
 9 comments -- they were invited to comment -- to
 10 identify the particular issues and what evidence
 11 they had that the issue was an increase.
 12 Q. Okay. But ultimately you would be the
 13 arbiter of that decision, and if you didn't agree
 14 with the data they provided, you would -- go
 15 ahead.
 16 A. That's what I testified to, yes.
 17 Q. Okay. And that question dealt with
 18 quality and the same issue on quantity.
 19 You're saying you'd listen to what
 20 they have to say if they have a concern it's going
 21 to increase quantity, but ultimately you would be
 22 the arbiter of whether it did or didn't?
 23 A. Yes.
 24 Q. Would you have to have any scientific
 25 or engineering evidence or study to support your

Page 129

1 opinion or --
 2 A. With regard to quantity?
 3 Q. Quantity.
 4 A. I would have to see calculations which
 5 demonstrated that there was a problem.
 6 Q. Did you, knowing of Pioneer's
 7 categorical prohibition against discharges, when
 8 you subsequently authorized detention facilities,
 9 did you commission studies -- or engineering
 10 studies to ensure that there would be no increase
 11 in the quantity?
 12 A. Every -- every development was
 13 required to submit a report on the matter. And
 14 generally those reports were devoted to quantity.
 15 Q. Every development in this case that
 16 tried to comply with the storm water manual
 17 submitted a report showing there would be no
 18 increase in the quantity resulting from
 19 discharging into Pioneer facilities?
 20 A. That was a requirement.
 21 Q. Have you seen those reports?
 22 A. Some of them.
 23 Q. Okay. And the last sentence, "on the
 24 discharge facility -- or "if the discharge
 25 facility interferes with operation." We talked

Page 130

1 about that earlier in my questions about storm
 2 water left in canals during the offseason and the
 3 testimony that there has been interference.
 4 So do you recall that line of
 5 questioning?
 6 A. I do.
 7 Q. Okay. Isn't that what that's talking
 8 about right here, that the irrigation --
 9 A. The --
 10 Q. -- sorry, the irrigation district
 11 would have veto power if they can show discharges
 12 interfere with the operation of their facilities?
 13 A. My memory is that comment was related
 14 to the issue if the structure, like the discharge
 15 structure, somehow interfered with their
 16 operation.
 17 Q. That's your memory of that?
 18 A. That's correct.
 19 Q. Who gets to decide that, whether a
 20 particular discharge interferes with operation of
 21 their facilities? Does Pioneer get to determine
 22 that or, again, is that --
 23 A. If Pioneer had an objection on the
 24 basis of operation, they could reply in their
 25 comments.

Page 131

1 Q. But ultimately you would be the
 2 determiner?
 3 A. That's correct.
 4 Q. Who do you think, just in general,
 5 would be in the best position to know and be
 6 familiar with what's going to interfere with
 7 Pioneer's facilities? Pioneer or the City?
 8 A. Inasmuch as they seldom provided
 9 comments in that context, I don't know what --
 10 what their abilities were in that regard. Their
 11 comments were no discharge anytime, anywhere from
 12 urban areas. So they didn't seem to have any
 13 criteria except land use.
 14 Q. Did you have any opinion at this time
 15 when you learned of Pioneer's categorical rule
 16 prohibiting discharges of urban storm water, did
 17 you have an opinion at that time that that wasn't
 18 a reasonable rule, that that wasn't fair, that
 19 wasn't logical?
 20 A. Most definitely.
 21 Q. Okay. Did you think they had a
 22 different kind of rule, that they allow some,
 23 prohibit some? What do you think would have been
 24 a more reasonable approach for them to have taken?
 25 A. We would have been interested in them

Page 132

EXHIBIT D
TO AFFIDAVIT OF SCOTT L. CAMPBELL

From: Timothy J. Frans
Sent: Friday, January 04, 2008 08:18 AM
To: Lee Van De Bogart
Subject: RE: Drainage Problems at Montecito Park

Have you contacted Eric Strand with Hubble Homes about this? His e-mail is below.

T.J. Frans
Engineering Tech I
City of Caldwell
(208) 455-3006

-----Original Message-----

From: Lee Van De Bogart
Sent: Thursday, January 03, 2008 5:22 PM
To: Timothy J. Frans
Subject: RE: Drainage Problems at Montecito Park

I am working on the drainage problem at Montecito No. 1. The city street crew have temporary modified the overflow to the A drain at the north end of the subdivision that was set to high and caused water to back in Central Park Street during storms. I have surveyed the area of Middle Park Way that floods and the existing storm drainage system in the park. I am looking at what long term solutions will be required to solve all the flooding before proceeding.

-----Original Message-----

From: Timothy J. Frans
Sent: Thursday, January 03, 2008 4:47 PM
To: Lee Van De Bogart
Cc: 'estrand@hubblehomes.com'
Subject: FW: Drainage Problems at Montecito Park

Lee,

Can you please reply to Eric Strand and help him out with his questions on the Montecito No. 1 drainage issues?

Thanks,

T.J. Frans
Engineering Tech I
City of Caldwell
(208) 455-3006

-----Original Message-----

From: Eric Strand [mailto:estrand@hubblehomes.com]
Sent: Thursday, January 03, 2008 4:45 PM
To: Timothy J. Frans
Subject: FW: Drainage Problems at Montecito Park

TJ,

Can you give me Lee's email?

From: Jeff Mcfrederick [mailto:jmcfrederick@ci.caldwell.id.us]
Sent: Thursday, January 03, 2008 10:30 AM
To: Eric Strand
Subject: RE: Drainage Problems at Montecito Park

Lee Van De Bogart (Staff Engineer)

-----Original Message-----

From: Eric Strand [mailto:estrand@hubblehomes.com]
Sent: Wednesday, January 02, 2008 3:33 PM
To: Jeff Mcfrederick
Subject: Drainage Problems at Montecito Park

Jeff,

Can you tell me again who from your department who is handling the drainage issues at Montecito Park #1? I had asked this question once before out of concern for our homeowners and I had not heard from anybody as to what the city was going to do.

Thanks,

Eric Strand

Hubble Homes

From: Lee Van De Bogart
Sent: Friday, January 04, 2008 08:19 AM
To: Timothy J. Frans
Subject: RE: Drainage Problems at Montecito Park

Not yet but I will contact him this morning.

-----Original Message-----

From: Timothy J. Frans
Sent: Friday, January 04, 2008 8:18 AM
To: Lee Van De Bogart
Subject: RE: Drainage Problems at Montecito Park

Have you contacted Eric Strand with Hubble Homes about this? His e-mail is below.

T.J. Frans
Engineering Tech I
City of Caldwell
(208) 455-3006

-----Original Message-----

From: Lee Van De Bogart
Sent: Thursday, January 03, 2008 5:22 PM
To: Timothy J. Frans
Subject: RE: Drainage Problems at Montecito Park

I am working on the drainage problem at Montecito No. 1. The city street crew have temporary modified the overflow to the A drain at the north end of the subdivision that was set to high and caused water to back in Central Park Street during storms. I have surveyed the area of Middle Park Way that floods and the existing storm drainage system in the park. I am looking at what long term solutions will be required to solve all the flooding before proceeding.

-----Original Message-----

From: Timothy J. Frans
Sent: Thursday, January 03, 2008 4:47 PM
To: Lee Van De Bogart
Cc: 'estrand@hubblehomes.com'
Subject: FW: Drainage Problems at Montecito Park

Lee,

Can you please reply to Eric Strand and help him out with his questions on the Montecito No. 1 drainage issues?

Thanks,

T.J. Frans
Engineering Tech I
City of Caldwell
(208) 455-3006

-----Original Message-----

From: Eric Strand [mailto:estrand@hubblehomes.com]
Sent: Thursday, January 03, 2008 4:45 PM
To: Timothy J. Frans
Subject: FW: Drainage Problems at Montecito Park

TJ,

Can you give me Lee's email?

From: Jeff Mcfrederick [mailto:jmcfrederick@ci.caldwell.id.us]
Sent: Thursday, January 03, 2008 10:30 AM
To: Eric Strand
Subject: RE: Drainage Problems at Montecito Park

Lee Van De Bogart (Staff Engineer)

-----Original Message-----

From: Eric Strand [mailto:estrand@hubblehomes.com]
Sent: Wednesday, January 02, 2008 3:33 PM
To: Jeff Mcfrederick
Subject: Drainage Problems at Montecito Park

Jeff,

Can you tell me again who from your department who is handling the drainage issues at Montecito Park #1? I had asked this question once before out of concern for our homeowners and I had not heard from anybody as to what the city was going to do.

Thanks,

Eric Strand

Hubble Homes

From: Lee Van De Bogart
Sent: Friday, January 04, 2008 09:04 AM
To: Eric Strand (estrand@hubblehomes.com)
CC: Timothy J. Frans
Subject: Flooding at Montecito Park #1

I am working on the drainage problem at Montecito No. 1. The city street crew has modified the existing overflow to the A Drain at the north end of the subdivision that was set too high and caused water to back in Central Park Street during storms. Additional work to restore the site will depend on final design.

I have surveyed the area of Middle Park Way that floods and the existing storm drainage system in the park. There is no overflow to A Drain for the drainage system at the park. The relocated A Drain water surface at the east entrance to the subdivision is near the elevation of the road surface at the park. I am reviewing existing storm drainage designs for both systems and looking into solutions to the flooding problems before proceeding.
If you have any questions you can call me at 455-3006.

From: Lee Van De Bogart
Sent: Thursday, January 03, 2008 05:22 PM
To: Timothy J. Frans
Subject: RE: Drainage Problems at Montecito Park

I am working on the drainage problem at Montecito No. 1. The city street crew have temporary modified the overflow to the A drain at the north end of the subdivision that was set to high and caused water to back in Central Park Street during storms. I have surveyed the area of Middle Park Way that floods and the existing storm drainage system in the park. I am looking at what long term solutions will be required to solve all the flooding before proceeding.

-----Original Message-----

From: Timothy J. Frans
Sent: Thursday, January 03, 2008 4:47 PM
To: Lee Van De Bogart
Cc: 'estrand@hubblehomes.com'
Subject: FW: Drainage Problems at Montecito Park

Lee,

Can you please reply to Eric Strand and help him out with his questions on the Montecito No. 1 drainage issues?

Thanks,

T.J. Frans
Engineering Tech I
City of Caldwell
(208) 455-3006

-----Original Message-----

From: Eric Strand [mailto:estrand@hubblehomes.com]
Sent: Thursday, January 03, 2008 4:45 PM
To: Timothy J. Frans
Subject: FW: Drainage Problems at Montecito Park

TJ,

Can you give me Lee's email?

From: Jeff Mcfrederick [mailto:jmcfrederick@ci.caldwell.id.us]
Sent: Thursday, January 03, 2008 10:30 AM
To: Eric Strand
Subject: RE: Drainage Problems at Montecito Park

Lee Van De Bogart (Staff Engineer)

-----Original Message-----

From: Eric Strand [mailto:estrand@hubblehomes.com]
Sent: Wednesday, January 02, 2008 3:33 PM
To: Jeff Mcfrederick
Subject: Drainage Problems at Montecito Park

Jeff,

Can you tell me again who from your department who is handling the drainage issues at Montecito Park #1? I had asked this question once before out of concern for our homeowners and I had not heard from anybody as to what the city was going to do.

Thanks,

Eric Strand

Hubble Homes

EXHIBIT E
TO AFFIDAVIT OF SCOTT L. CAMPBELL

Dawn Fowler

From: John Caywood [JCAYWOOD@pn.usbr.gov]
Sent: Friday, December 30, 2005 1:58 PM
To: Tino Tafoya
Cc: info@pioneerirrigation.com; David M Walsh; James Budolfson; Jerrold Gregg; Steven Jarsky
Subject: Re: Emergency pumping to Nampa drains

Update: 2 PM Fri. 12/30 -- Reclamation's West End Drain is threatening to overflow State Highway 19. Problem is being addressed by Pioneer Irrigation District and Idaho Transportation Dept.. - John

>>> John Caywood 12/30/2005 12:28:48 PM >>>

At 12:20 PM MST Friday Dec. 30, City of Nampa City Engineer Mike Fuss alerted Pioneer Irrigation District & me that they've started emergency pumping of storm water to BuRec drains to prevent property damage and maintain public health & safety in many locations within the City.

City Sewer treatment plant is within 1 inch of flooding and causing extensive secondary problems. There is a dire need to prevent property damage & remedy life-threatening situations like 17 year old was killed in drain a day or so ago.

Nampa City PW Supt. is John Fickel cell 250-0330

- John Caywood SRW Realty Specialist ph. 383-2219

EXHIBIT F
TO AFFIDAVIT OF SCOTT L. CAMPBELL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION)	
DISTRICT,)	
)	Case No. CV 08-556-C
Plaintiff,)	
)	
vs.)	
)	
CITY OF CALDWELL,)	
)	
Defendant.)	
)	
<hr/>		
CITY OF CALDWELL,)	
)	
Counterclaimant,)	
vs.)	
)	
PIONEER IRRIGATION)	
DISTRICT,)	
)	
Counterdefendant.)	
)	
<hr/>		

VIDEOTAPED DEPOSITION OF JEFFREY SCOTT

April 15, 2009

Boise, Idaho

Susan L. Sims, CSR No. 739

1 system." Did I read that correctly?
 2 A Uh-huh.
 3 Q Do you recall the several days of
 4 consecutive rain in December 2005 this is
 5 referring to?
 6 A I do.
 7 Q Okay. And where did the overflow of
 8 Pioneer's canals and ditches occur that's
 9 referred to at the lower end of the system?
 10 A The Phyllis Canal.
 11 Q Okay. And do you know whether that
 12 was caused by urban stormwater or agricultural
 13 stormwater?
 14 A A combination of both.
 15 Q Okay. Just caused by stormwater as
 16 far as you can tell, right?
 17 A Correct.
 18 Q And Pioneer is not able to determine
 19 how much of the stormwater that occurred on those
 20 consecutive days in December 2005 came from
 21 agricultural sources versus urban sources,
 22 correct?
 23 A Correct.
 24 Q Okay. Is Pioneer able to say, or you
 25 as a superintendent able to say during those

Page 221

1 several consecutive days of rain in
 2 December 2005, that the flooding wouldn't have
 3 occurred but for urban stormwater discharges?
 4 MR. CAMPBELL: Objection, calls for
 5 speculation.
 6 THE WITNESS: I'm not sure.
 7 Q (BY MR. STIDHAM) That's fair. Would
 8 it be that you'd have to speculate if asked the
 9 question, did the overflow during the several
 10 consecutive days of rain in December 2005 occur
 11 because of urban stormwater discharge?
 12 A Again, I'm not sure.
 13 Q You'd have to speculate?
 14 A Yeah.
 15 Q And you're the one in charge of making
 16 sure the system doesn't flood, correct?
 17 A That's correct.
 18 Q Do you know how much groundwater was
 19 in Pioneer's system during those consecutive days
 20 of rain in December 2005 that's being referred to
 21 in this paragraph?
 22 MR. CAMPBELL: Objection, ambiguous.
 23 THE WITNESS: I don't know.
 24 Q (BY MR. STIDHAM) Does the amount of
 25 groundwater in Pioneer's system increase during

Page 222

1 storm events?
 2 MR. CAMPBELL: Objection, ambiguous.
 3 THE WITNESS: I'd be guessing.
 4 Q (BY MR. STIDHAM) Okay. Look at --
 5 let's see, it's the third full paragraph on this
 6 page, if you would. The one that begins, "In
 7 addition." Do you see that?
 8 A Uh-huh.
 9 Q And you can take your time to -- take
 10 your time to read that paragraph, if you would.
 11 A Okay.
 12 Q Okay. That paragraph refers to the
 13 Bureau of Reclamation recently conducting a
 14 stormwater flow projection. Do you see that?
 15 A I did.
 16 Q Have you reviewed that Bureau of
 17 Reclamation stormwater flow projection study?
 18 A I have not.
 19 Q And it says the study involves the
 20 Five Mile Creek Drain/Watershed. Do you see
 21 that?
 22 A I do.
 23 Q Does that -- is the Five Mile
 24 Creek/Drain Watershed, does that include, to your
 25 understanding, any portion of Pioneer's

Page 223

1 facilities?
 2 MR. CAMPBELL: Objection, ambiguous.
 3 THE WITNESS: Are you asking if the
 4 Five Mile is our facility?
 5 Q (BY MR. STIDHAM) Yeah, I guess we
 6 could ask it that way.
 7 A Yes.
 8 Q Five Mile Drain?
 9 A Five Mile Drain is our facility within
 10 our boundaries.
 11 Q Okay. Now, it goes on to say, "This
 12 study concluded that the flow of the Five Mile
 13 Drain at the Phyllis Canal, during 24 hour 50 and
 14 100 year storm events, would range from 1,100 to
 15 over 1,500 cubic feet per second after the
 16 upstream area of the watershed is fully
 17 developed." Did I read that correctly?
 18 A Uh-huh.
 19 Q Okay. Do you have any understanding
 20 as to what the carrying capacity is for Pioneer's
 21 facilities in that area?
 22 MR. CAMPBELL: Objection, it's
 23 ambiguous.
 24 THE WITNESS: I don't.
 25 Q (BY MR. STIDHAM) Okay. And then the

Page 224

EXHIBIT G
TO AFFIDAVIT OF SCOTT L. CAMPBELL

Article 1

STORM DRAINAGE

13-01-01: SHORT TITLE:

This Article shall be known and may be recited and referred to as *THE CALDWELL STORM DRAINAGE ORDINANCE*. (Ord. 2242, 12-21-1998)

13-01-03: PURPOSE:

The purpose of this Chapter is to provide for the establishment of and the implementation of a uniform system of standards relating to storm drainage within the City. Such a system will allow builders, contractors, developers and property owners to know what standards relating to storm drainage apply to construction, development sites and other property within the City. The further purpose of this Article is to provide for economy and efficiency in the administration of City government and thereby provide for safety, promoting of the health and prosperity, peace and good order, comfort and convenience of the City and the inhabitants thereof, and protecting the property therein. (Ord. 2242, 12-21-1998)

13-01-05: AUTHORITY:

This Article is adopted pursuant to article 12, section 2 of the Idaho constitution and Idaho Code sections, 50-201; 50-302; 50-313; 50-332; 50-333; 50-1703; 67-6502; 67-6503; 67-6518. (Ord. 2242, 12-21-1998)

13-01-07: ESTABLISHMENT OF STORM DRAINAGE STANDARDS:

- (1) The City Engineer shall prepare standards for the City storm drainage system which are necessary and beneficial for implementation and maintenance of an effective storm drainage system within the City, and shall submit the proposed standards to the City Council for review and adoption.
- (2) Prior to adoption, amendment or rejection of said standards the City Council shall hold a hearing in accordance with the procedure established for public hearings in matters of planning and zoning by Idaho Code, section 67-6509.
- (3) Upon adoption of standards for the City storm drainage system by the City Council, the City Engineer will prepare a manual containing such standards and will make the Manual available for public inspection.
- (4) The City Engineer shall implement the adopted standards whenever applicable.
- (5) When the City Engineer is of the opinion that an amendment of the standards is necessary or appropriate, the proposed amendment shall be submitted to the City Council for review. Prior to

adoption or rejection of the proposed amendment the City Council shall hold a public hearing as provided in subsection (2) of this Section. (Ord. 2242, 12-21-1998)

13-01-09: APPEAL PROCEDURE:

- (1) Any party aggrieved by a decision of the City Engineer in administering the standards provided for herein may appeal said decision to the City Council by filing a written notice of such appeal with the City Clerk within ten (10) days of the date of such decision.
- (2) The City Council will conduct a public hearing at the next regularly scheduled Council meeting, following receipt of the appeal, provided that a notice period of at least fifteen (15) days be provided prior to said hearing. If there is sufficient time for allowing said notice then the public hearing will be held at the first regularly scheduled Council meeting, which will allow for a fifteen (15) day notice of hearing.
- (3) The public hearing shall be conducted in accordance with the provisions of the Administrative Procedures Act, Idaho Code, sections 67-5220 et seq.
- (4) The decision of the City Council as to the appeal shall be a final decision.
- (5) A party aggrieved by the appeal decision may seek judicial review in the District Court of the Third Judicial District within twenty-eight (28) days of the issuance of the appeal decision by the City Council. (Ord. 2242, 12-21-1998)

13-01-11: REPEAL AND RESCISSION:

Any prior ordinance or part thereof, or any prior resolution adopted pursuant thereto which is inconsistent with or contradictory to this Article or the standards adopted pursuant to this ordinance relating to the City storm drainage system are hereby rescinded and repealed. (Ord. 2242, 12-21-1998)

13-01-13: EFFECT OF REPEAL AND RESCISSION:

Provisions of this Chapter and the standards implemented hereunder are not to be taken as a statement of intent by the City Council regarding the meaning or interpretation of any other ordinance. (Ord. 2242, 12-21-1998)

13-01-15: SAVING CLAUSE:

The provisions of this Article and subsequently adopted standards are hereby declared to be severable. If any provisions of this Article and subsequently adopted standards or application of such provision to any person or circumstances is declared to be invalid for any reason, such declaration shall not affect the validity of the remaining portion of this Article and subsequently adopted

